(15)

No. 04-1324
Title: Patrick Day, Petitioner
v.
James R. McDonough, Interim Secretary, Florida Department of Corrections
Docketed: April 1, 2005
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (04-10778)
Decision Date: November 29, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Feb 15 2005	Application (04A713) to extend the time to file a petition for a writ of certiorari from February 27, 2005 to March 30, 2005, submitted to Justice Kennedy.
Feb 17 2005	Application (04A713) granted by Justice Kennedy extending the time to file until March 30, 2005.
Mar 30 2005	Petition for a writ of certiorari filed. (Response due May 2, 2005)
Apr 1 2005	Motion for leave to file amici brief filed by Professors John H. Blume, et al.
Apr 11 2005	Motion for leave to file amicus brief filed by National Association of Criminal Defense Lawyers.
Apr 22 2005	Waiver of right of respondent James V. Crosby, Jr., Secretary, Florida Department of Corrections to respond filed.
May 3 2005	DISTRIBUTED for Conference of May 19, 2005.
May 13 2005	Response Requested . (Due June 13, 2005)
Jun 2 2005	Order extending time to file response to petition to and including July 13, 2005.
Jul 8 2005	Brief of respondent James V. Crosby, Jr., Secretary, Florida Department of Corrections in opposition filed.
Jul 19 2005	Reply of petitioner Patrick A. Day filed. (Distributed)
Jul 20 2005	DISTRIBUTED for Conference of September 26, 2005.
Sep 27 2005	Motion for leave to file amicus brief filed by Professors John H. Blume, et al. GRANTED.
Sep 27 2005	Motion for leave to file amicus brief filed by National Association of Criminal Defense Lawyers GRANTED.
Sep 27 2005	Petition GRANTED.
Oct 18 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including November 30, 2005.
Nov 27 2005	SET FOR ARGUMENT on Monday, February 27, 2006.
Nov 30 2005	Brief of petitioner Patrick Day filed.
Nov 30 2005	Joint appendix filed.
Nov 30 2005	Brief amicus curiae of National Association of Criminal Defense lawyers filed.
Nov 30 2005	Brief amici curiae of Professors John H. Blume, et al. filed.
Nov 30 2005	Brief amici curiae of Civil Procedure and Federal Courts Professors Janet Cooper, et al. filed.
Dec 9 2005	CIRCULATED.
Dec 14 2005	Extension of time within which to file respondent's brief on the merits to and including January 17, 2006.

Jan 17 2006	Brief amicus curiae of United States filed. (Distributed)
Jan 17 2006	Brief of respondent James V. Crosby, Jr., Secretary, Florida Department of Corrections filed. (Distributed)
Jan 17 2006	Brief amici curiae of Texas, and 30 Other States filed. (Distributed)
Jan 18 2006	Record received from U.S.C.A. 11th Circuit. (1 envelope)
Jan 19 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 23 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 24 2006	Record received from U.S.D.C. Northern Dist. of Florida (Pensacola). 1 Box
Feb 16 2006	Reply of petitioner Patrick Day filed. (Distributed)
Feb 27 2006	Argued. For petitoner: J. Brett Busby, Houston, Tex. For respondent: Christopher M. Kise, Solicitor General, Tallahassee, Fla.; and Douglas Hallward-Driemeier, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for the United States, as amicus curiae.)

(2) Supreme Court, U.S.
FILED

041324 MAR 30 2005

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

PATRICK A. DAY,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

28 U.S.C. § 2244(d) establishes a one-year limitations period for federal habeas corpus petitions filed by state prisoners. When Patrick Day filed his federal habeas petition, the magistrate judge examined it as required by Habeas Rule 4 and ordered the State to respond. In its answer, the State did not raise a limitations defense. Instead, it expressly conceded that Day's petition was timely. Nevertheless, almost a year after the petition was filed and seven months after the parties finished briefing the merits of Day's claims, the magistrate judge recommended *sua sponte* that the petition be dismissed as untimely. The district court adopted that recommendation and the Eleventh Circuit affirmed. Acknowledging a conflict with decisions of the Sixth and Ninth Circuits, the Eleventh Circuit held that the State's failure to plead limitations was not a waiver and that Rule 4 – contrary to its plain text – authorizes a court to dismiss a habeas petition *sua sponte* after an answer has been filed.

This case presents the following important questions on which the courts of appeals are divided:

1. Does the State waive a limitations defense to a habeas corpus petition when it fails to plead or otherwise raise that defense and expressly concedes that the petition was timely?

2. Does Habeas Rule 4 permit a district court to dismiss a habeas petition *sua sponte* after the State has filed an answer based on a ground not raised in the answer?

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PETITION FOR A WRIT OF CERTIORARI

Patrick A. Day respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is reported at 391 F.3d 1192. The report and recommendation of the magistrate judge (App., *infra*, 8a-15a) and the order of the district court adopting that recommendation and dismissing the petition (*id.* at 7a) are unreported.

JURISDICTION

The court of appeals' judgment was entered on November 29, 2004. Justice Kennedy extended the time for filing a petition for writ of certiorari to March 30, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2244(d) provides in relevant part:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. This limitation period shall run from the latest of—

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> * * * * *

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT

The fundamental issue in this case is whether a State waives the statute of limitations defense of 28 U.S.C. § 2244(d) by failing to assert it in the district court. In this case, the State did not plead the defense or otherwise bring it to the court's attention. To the contrary, it expressly conceded that the habeas petition was timely. Nevertheless, almost a year after the petition was filed, the court dismissed it *sua sponte* as untimely.

The Eleventh Circuit's decision affirming the dismissal acknowledged that other circuits have reached a contrary result. Specifically, the Eleventh Circuit took a position on the minority side of two important questions that have divided the courts of appeals.

First, it held that although a failure to plead limitations waives that defense under the Federal Rules of Civil Procedure, that result does not apply to habeas cases governed by AEDPA. This holding is contrary to decisions of the Third, Sixth, Ninth, and Tenth Circuits that the State waives AEDPA's limitations defense by failing to assert it.

Second, the Eleventh Circuit held that Habeas Rule 4 empowers the district court to dismiss a petition as untimely *sua sponte* even after the State files an answer that does not raise a limitations defense. In contrast, the Sixth and Ninth Circuits have concluded that the plain text of Rule 4 does not authorize *sua sponte* dismissals after the court orders the State to file an answer.

As this Court recognized in the context of another habeas defense, there is significant "uncertainty in the lower courts as to whether, or just when, a habeas court *may* consider a [defense] that the State at some point has waived, or failed to raise." *Trest* v. *Cain*, 522 U.S. 87, 90 (1997). This uncertainty has reached the point of open conflict with respect to the limitations defense. The Court should take this opportu-

nity to resolve the disagreements among the lower courts on these important and recurring issues.

A. Rules Governing Limitations

When a state prisoner files a petition for a writ of habeas corpus in federal court, one defense that the State may assert is limitations. Under 28 U.S.C. § 2244(d)(1), the prisoner has one year from the date his conviction and sentence become final on direct review to file a federal habeas petition. The courts of appeals have held that direct review is complete – and the limitations period begins to run – upon either the conclusion of certiorari proceedings in this Court or the expiration of the 90-day period for seeking certiorari.[1] If the prisoner later files an application for state post-conviction review, the federal limitations period is tolled while that application is "pending." 28 U.S.C. § 2244(d)(2).

If a state prisoner's petition is untimely under this statute, the judge may dismiss it summarily before ordering the State to file an answer. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rule 4") provides that a habeas petition "shall be examined promptly by the judge * * *. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief * * *, the judge shall make an order for its summary dismissal * * *. Otherwise the judge shall order the respondent to file an answer * * *."[2]

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[1] *E.g.*, *Locke* v. *Saffle*, 237 F.3d 1269, 1272-73 (10th Cir. 2001); *cf. Clay* v. *United States*, 537 U.S. 522, 524-25, 527 (2003) (reaching same conclusion under § 2255).

[2] The quoted language is from the rule in force at the time of the lower courts' decisions. The rule was amended effective December 1, 2004. According to the Advisory Committee notes, no substantive change was intended regarding the quoted portion of the rule.

When the judge orders the State to file an answer, the Federal Rules of Civil Procedure apply to the extent they are not inconsistent with the Habeas Rules. See Habeas Rule 11. The Civil Rules provide that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively * * * statute of limitations * * * and any other matter constituting an avoidance or affirmative defense." Fed. R. Civ. P. 8(c). Similarly, the rules require that "[e]very defense, in law or fact, to a claim for relief in any pleading * * * shall be asserted in the responsive pleading thereto if one is required * * *." Fed. R. Civ. P. 12(b).

As the Eleventh Circuit acknowledged, a party's failure to plead an affirmative defense such as limitations constitutes a waiver of that defense. App., *infra*, 4a. In this case, Day contends – and other circuits agree – that the State waived any limitations defense by failing to assert it in the district court.

B. Day's Trial And Direct Appeal

The events relevant to the issue of limitations begin with Day's trial and direct appeal. For the Court's convenience, a timeline of significant dates appears in the Appendix at page 16a.

Day was indicted for first-degree murder and tried in the Circuit Court of Escambia County, Florida. In September 1998, the jury convicted him of second-degree murder and found he carried a weapon during the offense. Ex. A-3.[3] Although the sentencing range for this crime was approximately 21-35 years, the trial judge departed upward and sentenced Day to 55 years in prison. The judge based this sentence on

[3] Relevant materials regarding Day's trial, direct appeal, and state post-conviction motion were attached as exhibits to the State's federal habeas corpus answer (Dkt. No. 7). In this petition, all citations to "Ex." refer to exhibits to the State's answer unless otherwise noted.

his own findings that (1) Day's record indicated an escalating pattern of criminal conduct, and (2) Day engaged in an elaborate cover-up of the crime. Ex. C; Ex. D at 3.

The public defender appealed Day's sentence to Florida's First District Court of Appeal. On December 21, 1999, the court of appeal affirmed in an unpublished opinion. Ex. G. It rejected the trial judge's first reason for departure, holding that Day's record did not show an escalating pattern of criminal conduct. As to the second reason, although the Florida Supreme Court had held that efforts to cover up a murder were not a valid ground for departure,[4] the court of appeal concluded that Day's trial counsel did not preserve that argument. Thus, the court presumed that the second reason was valid and upheld Day's sentence.

Day did not file a petition for a writ of certiorari asking this Court to review the court of appeal's decision.[5] His last day to do so was March 20, 2000. See Sup. Ct. R. 13.

C. State Post-Conviction Review

On March 9, 2001, Day filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Ex. I. The *pro se* motion alleged several claims of in-

[4] *Smith* v. *State*, 620 So. 2d 187 (Fla. 1993) (per curiam); *Connelly* v. *State*, 704 So. 2d 590, 591 (Fla. 4th DCA 1997); see also *Rendon* v. *State*, 690 So. 2d 645, 647-48 (Fla. 4th DCA 1997) (discussing continued validity of *Smith*).

[5] Because the court of appeal was the highest state court in which a decision could be had, this Court had jurisdiction to review that decision by writ of certiorari. 28 U.S.C. § 1257(a); see Fla. Const. art. 5, § 3(b) (limiting Florida Supreme Court review to, *inter alia*, certified questions or express conflict with other decisions); *Ibanez* v. *Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994) (granting certiorari when petitioner had no right of review in Florida Supreme Court); *Nash* v. *Fla. Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967) (same).

effective assistance by trial counsel. The state trial court denied the motion, Ex. J, and Day appealed that decision to the First District Court of Appeal.

On October 9, 2002, the court of appeal affirmed the denial of Day's motion without opinion. Ex. O. Day filed a motion for rehearing, which was denied on November 15. Dkt. No. 13.[6] The court of appeal issued its mandate on December 3, 2002. Ex. P. Day did not file a certiorari petition with this Court, and his last day to do so was February 13, 2003. Sup. Ct. R. 13.3.

D. The District Court Dismisses Day's Federal Petition *Sua Sponte*

Instead, Day drafted a federal petition for a writ of habeas corpus, which he provided to the prison authorities for mailing on January 8, 2003.[7] Dkt. No. 1. Day's *pro se* petition generally repeated the claims of ineffective assistance raised in his state post-conviction motion.

The magistrate judge examined the petition as required by Habeas Rule 4 and determined that it was "in proper form." Dkt. No. 4. She ordered the State to file an answer within 45 days. Consistent with Habeas Rule 5, the order stated that the answer should address whether Day had exhausted his state remedies and, if not, whether those remedies were still available. The order also provided that these defenses would be waived if not raised in the answer.

On March 19, 2003, the State filed an answer. Dkt. No. 7. The State did not assert the limitations bar of 28 U.S.C.

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[6] In this petition, documents filed in the district court are cited by docket number.

[7] The courts of appeals have applied the "prison mailbox" rule of *Houston* v. *Lack*, 487 U.S. 266, 270 (1988), to determine the date on which a prisoner's habeas corpus petition is filed. *E.g.*, *Noble* v. *Kelly*, 246 F.3d 93, 97-98 (2d Cir. 2001) (per curiam).

§ 2244(d) in its answer or in any other district court filing. Moreover, its answer expressly stated that "Respondent agrees the petition is timely; filed after 352 days of untolled time." Dkt. No. 7, at 3. The State then spent 28 pages addressing the merits of Day's ineffective assistance claims.

The magistrate judge allowed Day to file a reply, which he did on April 2, 2003. Dkt. No. 9. In June, the case was referred to a different magistrate judge.

On December 11, 2003, over eleven months after the petition was filed and seven months after the parties finished briefing the merits of Day's claims, the magistrate judge issued an order stating that the petition was untimely and requiring Day to show cause why it should not be dismissed, Dkt. No. 11. Day responded that his petition was timely for three reasons: (1) the State's answer agreed it was timely; (2) the statutory tolling period included the time for seeking certiorari on state post-conviction review; and (3) the public defender who handled his direct appeal refused to provide him with the trial transcript for almost a year. Dkt. No. 13.

The magistrate judge disagreed with these reasons and issued a report recommending that Day's petition be dismissed. App., *infra*, 8a-15a. The judge noted that 353 days had elapsed between the expiration of the time for seeking certiorari on direct review (March 20, 2000) and the beginning of the tolling period for state post-conviction review (March 9, 2001). He stated that Eleventh Circuit precedent excluded from this tolling period the time for seeking certiorari on state post-conviction review. Thus, the judge held that tolling ended when the court of appeal issued its mandate on December 3, 2002, and that the one-year limitations period expired 12 days later on December 16, 2002. Because Day's petition was not filed until January 8, 2003, it was 23 days late. The judge concluded that Day's difficulty obtaining the transcript did not warrant equitable tolling and recommended dismissal of the petition.

Day filed a timely objection to the magistrate judge's report and recommendation, but the district court adopted the report and dismissed his petition. App., *infra*, 7a. The court also denied Day a certificate of appealability. The Eleventh Circuit, however, granted him a certificate to determine "[w]hether the district court erred in addressing the timeliness of appellant's habeas corpus petition * * * after the appellee had conceded that [it] was timely." Dkt. No. 41.

E. The Eleventh Circuit Affirms, Noting A Circuit Split

On appeal, the Eleventh Circuit affirmed the dismissal. App., *infra*, 1a-6a. The court began by reviewing the dates relevant to the issue of limitations. It agreed with the magistrate judge that the tolling period ended when the court of appeal issued its mandate affirming the denial of state post-conviction relief, not when Day's time to seek certiorari review of that decision expired. *Id.* at 2a-3a. Thus, it held that the petition was 23 days late, making the state's concession of timeliness "patently erroneous." *Id.* at 2a, 4a.

Turning to the State's failure to assert the limitations bar below, the court observed that limitations is an affirmative defense that is waived if not pleaded "[i]n an ordinary civil case." *Id.* at 4a. It concluded that habeas cases are not controlled by this rule, however. Relying on circuit precedent, the court held that even after the State files an answer that does not plead limitations, Habeas Rule 4 allows the district court to dismiss the petition as untimely *sua sponte*. *Id.* at 4a-5a.

The court acknowledged that the Sixth and Ninth circuits had "reached a contrary result," ruling that a district court lacks the power to cure *sua sponte* the State's waiver of a limitations defense. App., *infra*, 6a (citing *Scott* v. *Collins*, 286 F.3d 923, 930 (6th Cir. 2002); *Nardi* v. *Stewart*, 354 F.3d 1134, 1141-42 (9th Cir. 2004)). It concluded, however, that "our precedent * * * is binding and requires us to part with the Sixth and Ninth Circuits." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. THERE ARE EXPRESS CONFLICTS IN THE CIRCUITS ON WHETHER HABEAS RULE 4 ALLOWS A COURT TO CURE THE STATE'S WAIVER OF A LIMITATIONS DEFENSE.

There are two reasons why Day's petition should not have been dismissed as untimely after the State failed to raise the one-year limitations period of 28 U.S.C. § 2244(d). *First*, the State waived this limitations defense by not asserting it in the district court. *Second*, Habeas Rule 4 does not authorize a court to dismiss a habeas petition *sua sponte* after an answer has been filed. Because both of these issues have divided the courts of appeals, they should be addressed by this Court.

A. The Eleventh Circuit's Decision Conflicts With Holdings Of The Third, Sixth, Ninth, And Tenth Circuits That The State Waives A Limitations Defense By Failing To Raise It.

As the first step in its analysis, the Eleventh Circuit held that although a failure to plead limitations waives that defense in an ordinary civil case, "a habeas case that is governed by AEDPA is not controlled by this rule." App., *infra*, 4a. The First Circuit reached the same conclusion in two unpublished opinions.[8] The Third, Sixth, Ninth, and Tenth Circuits have held, however, that "the [S]tate waives the statute of limitations by failing to raise the defense in its answer." *Nardi*, 354 F.3d at 1141.

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[8] *Saucier* v. *Warden*, 215 F.3d 1312 (table), 2000 WL 739713, at *1 (1st Cir. June 5, 2000) (per curiam) (unpublished) ("[W]hile the state failed to assert the limitations defense in its answer to the petition, we conclude that it has not waived the defense. Given the early stage of proceedings, the state might yet have raised the defense by amending its answer or filing a motion for summary judgment."); see also *Celikoski* v. *United States*, 21 Fed. Appx. 19, 23 (1st Cir. 2001) (per curiam) (unpublished) (same).

Both the Sixth Circuit in *Scott* and the Ninth Circuit in *Nardi* reasoned that there "is no dispute" that AEDPA's "§ 2244(d) statute of limitations defense is an affirmative defense as opposed to a jurisdictional defect." *Scott*, 286 F.3d at 927; *Nardi*, 354 F.3d at 1140. They concluded that the Civil Rules applied to this defense by virtue of Habeas Rule 11.[9] *Scott*, 286 F.3d at 927 n.4. "Accordingly, Federal Rules of Civil Procedure 8(c) and 12(b) require[d] that the [S]tate raise the statute of limitations in its first responsive pleading to avoid waiving the defense." *Nardi*, 354 F.3d at 1140. Because the State had not done so in either case, the courts found the defense waived. *Id.* at 1141; *Scott*, 286 F.3d at 928.

Similarly, the Third Circuit has held that "affirmative defenses under the AEDPA should be treated the same as affirmative defenses in other contexts, and, if not pleaded in the answer, they must be raised at the earliest practicable moment thereafter" to avoid waiver. *Robinson* v. *Johnson*, 313 F.3d 128, 137 (3d Cir. 2002). *Robinson* relied on cases from other circuits recognizing "that a limitations defense may be waived by a State defendant in a habeas proceeding." *Id.* at 134. It also observed that "the limitations provision of the AEDPA is not jurisdictional in nature," concluding that "because the [provision] is subject to equitable modifications such as tolling, it is also subject to other non-jurisdictional, equitable considerations, such as waiver." *Ibid.* The Third Circuit has applied *Robinson* to find waiver when the State does not timely assert a limitations defense in the district court. *Crews* v. *Horn*, 360 F.3d 146, 150 n.2 (3d Cir. 2004); *Stewart* v. *Hendricks*, 71 Fed. Appx. 904 (3d Cir. 2003).

Finally, the Tenth Circuit and a district court in the Seventh Circuit have held that the State waives AEDPA's limitations defense by not raising it in a timely manner. In *Davis* v. *LeMaster*, 216 F.3d 1086 (table), 2000 WL 702408, at *1 n.2 (10th Cir. May 26, 2000) (unpublished), the Tenth Circuit concluded that a habeas petition had not been timely filed. Because the limitations period was not jurisdictional and the State had not raised the issue, however, the court held it had been waived. *Ibid.*; see also *United States ex rel. Galvan* v. *Gilmore*, 997 F. Supp. 1019, 1026 (N.D. Ill. 1998) (same).

[9] Habeas Rule 11 provides that "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." See also n.17, *infra*.

In this case, the State did not assert a limitations defense in its answer or in any other district court filing. To the contrary, the State expressly conceded that Day's petition was timely. Thus, under the law of the Third, Sixth, Ninth, and Tenth Circuits, the State waived the limitations defense and Day's petition would not have been dismissed. The Court should grant certiorari to resolve this conflict among the courts of appeals.

B. The Eleventh Circuit's Holding That Habeas Rule 4 Authorizes *Sua Sponte* Dismissal After An Answer Has Been Filed Is Contrary To Decisions Of The Sixth And Ninth Circuits.

Instead of applying the settled waiver principles of the Civil Rules, the Eleventh Circuit concluded that a State's "failure to plead the [limitations] defense does not bar the district court from raising the issue *sua sponte* and ordering the petitioner to show cause why the petition should not be dismissed." App., *infra*, 4a-5a. It purported to join the Second, Fourth, Fifth, and Ninth Circuits in holding that Habeas Rule 4 authorizes *sua sponte* dismissal even "after the [S]tate has filed a response to the habeas petition that does not raise the statute of limitations as an affirmative defense." *Id.* at 4a. Yet the cases it cited from those circuits held only that Rule 4 allows summary dismissals *before* the State files an answer.[10]

[10] See *Hill* v. *Braxton*, 277 F.3d 701, 703, 705-06 (4th Cir. 2002); *Herbst* v. *Cook*, 260 F.3d 1039, 1041-42 & n.3 (9th Cir. 2001);

In fact, the Ninth Circuit has held that a "district court lacks the authority to *sua sponte* dismiss a habeas petition as time-barred *after* the [S]tate files an answer which fails to raise the statute of limitations defense." *Nardi*, 354 F.3d at 1141 (emphasis added). *Nardi* noted that the plain text of Rule 4 requires a judge to examine the petition promptly and "make an order for its summary dismissal" if "it plainly appears from the face of the petition * * * that the petitioner is not entitled to relief * * *. ***Otherwise*** the judge shall order the respondent to file an answer * * *." Habeas Rule 4 (emphasis added). Thus, the court held that "Rule 4 does *not* authorize a court to dismiss the petition *sua sponte* after ordering the respondent to file an answer." *Nardi*, 354 F.3d at 1141.

Similarly, the Sixth Circuit has held that "[a] district court's ability to dismiss a habeas petition *sua sponte* as an initial matter * * * does not amount to a power to cure *sua sponte* a party's waiver of an affirmative defense." *Scott*, 286 F.3d at 930. *Scott* relied on Rule 4's use of the word "otherwise." It concluded that "Rule 4 gives a district court the ability to dismiss habeas petitions *sua sponte*, but that ability expires when the judge orders a respondent to file an answer or take other appropriate action." *Ibid.* Because the State had answered without pleading a limitations defense, the court of appeals held that the district court's subsequent *sua sponte* dismissal "improperly cured respondent's waiver." *Id.* at 931.

If Day's petition had been filed in the Sixth or Ninth Circuits, the State's failure to assert a limitations defense in its answer – not to mention its concession that Day's petition was timely – would have barred the magistrate judge from

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Acosta v. *Artuz*, 221 F.3d 117, 121-24 (2d Cir. 2000); *Kiser* v. *Johnson*, 163 F.3d 326, 327-29 (5th Cir. 1999); *cf. Scott*, 286 F.3d at 929 & n.7 (noting this distinction).

raising the issue *sua sponte*. This disagreement among the circuits should be addressed by this Court.

C. This Court Should Resolve The Confusion Among The Lower Courts On These Important And Recurring Issues.

In the context of another habeas defense (procedural default), this Court has "recognize[d] some uncertainty in the lower courts as to whether, or just when, a habeas court *may* consider a procedural default that the State at some point has waived, or failed to raise." *Trest* v. *Cain*, 522 U.S. 87, 90 (1997). As the preceding discussion shows, the same uncertainty – and, indeed, open conflict – exists with respect to the limitations defense. The Court should grant certiorari in this case to resolve these express disagreements among the circuits.

Whether a district court may dismiss a habeas petition on limitations grounds after the State fails to raise that defense is a recurring issue on which six circuits have now taken sides. See Parts I.A.-B., *supra*. Thus, the issue is ripe for consideration by this Court.

In addition, the Court has made clear that the questions presented by this petition are important ones worthy of its consideration. In recent years, the Court has agreed to decide several cases about the extent to which the Civil Rules apply to habeas petitions[11] – a topic it addressed last Term in *Banks* v. *Dretke*, 540 U.S. 668, 703-05 (2004). The Court also fre-

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[11] See *Mayle* v. *Felix*, No. 04-563 (whether an amendment of a habeas petition to add a new claim relates back to the date of filing under Fed. R. Civ. P. 15(c)(2) for purposes of the one-year statute of limitations); *Gonzalez* v. *Crosby*, No. 04-6432 (whether a Civil Rule 60(b) motion constitutes a prohibited "second or successive" petition); *Woodford* v. *Garceau*, 538 U.S. 202, 208 (2003) (whether Civil Rule 3 determines when a habeas suit begins).

quently grants certiorari to settle disputes regarding AEDPA's statute of limitations.[12]

Finally, the above disagreements among the courts of appeals have given rise to widespread confusion and uncertainty that this Court needs to dispel. For example, a Third Circuit panel recently undermined *Robinson*'s holding that the State waives limitations by failing to raise it "at the earliest practicable moment." In *Long* v. *Wilson*, 393 F.3d 390, 393 (3d Cir. 2004), the State answered a habeas petition without raising a limitations defense. Nearly one year later, a magistrate judge recommended *sua sponte* that the petition be dismissed as untimely. After the petitioner filed objections with the district court, the State filed a response agreeing with the magistrate's limitations analysis.[13] *Id.* at 395. To avoid the rule of *Robinson*, the court of appeals held that the State's response "in effect made a timely and proper amendment of its answer * * * and that the District Court, in effect, allowed the amendment in its discretion." *Id.* at 399.

Long's tortured reasoning cannot stand together with *Robinson*. As another Third Circuit panel observed, "[o]ur holding in *Robinson* that the limitations defense can be waived by a state respondent effectively forecloses" the argument "that a district court may raise the AEDPA's limitations provision *sua sponte*." *Stewart*, 71 Fed. Appx. at 906.

Decisions of the Fourth and Eleventh Circuits offer further evidence of the lower courts' confusion regarding waiver

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[12] See *Dodd* v. *United States*, No. 04-5286 (when the statute begins to run on a § 2255 motion asserting a new right); *Pace* v. *DiGuglielmo*, No. 03-9627 (whether an untimely state post-conviction petition will toll the statute); *Clay* v. *United States*, 537 U.S. 522, 524-25 (2003) (when the statute begins to run).

[13] *Long* cannot support the result here because the State filed no response to Day's objections and made no other attempt to raise the limitations issue in the district court.

and *sua sponte* consideration of limitations in the habeas context. In *Jones* v. *Nagle*, 349 F.3d 1305, 1308 (11th Cir. 2003), the Eleventh Circuit held that a State waived its limitations defense by failing to dispute the petitioner's equitable tolling argument in the district court. Given the State's similar failure to dispute Day's equitable tolling argument in this case (see p. 7, *supra*), *Jones* supports a finding of waiver here. That result, however, is inconsistent with the Eleventh Circuit's holding below that AEDPA's limitations defense is not controlled by ordinary waiver rules. App., *infra*, 4a.

In addition, the Fourth Circuit recently observed that habeas counsel may wish to avoid pleading unfavorable facts about timeliness in order "to leave open the possibility that the limitations period as an affirmative defense will be waived." *McMillan* v. *Jarvis*, 332 F.3d 244, 248 (4th Cir. 2003) (citing Sixth Circuit decision in *Scott*). Yet it also stated in dicta that "a district court may still raise the limitations period when the [S]tate has failed to do so." *Id.* at 249.

These contradictory statements reveal the lower courts' fundamental uncertainty regarding the nature and waivability of AEDPA's limitations defense. This Court should step in to resolve the confusion.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ELEVENTH CIRCUIT'S DECISION IS CONTRARY TO THE CIVIL RULES AND TO HABEAS RULE 4.

The Eleventh Circuit's decision not only creates an irreconcilable split among the circuit courts, it also directly contravenes rules applicable to civil cases generally and habeas petitions in particular. Under those rules, the State waived AEDPA's statute of limitations defense by failing to include the defense in its answer. The magistrate judge could not cure this waiver because his authority to dismiss the habeas petition *sua sponte* expired when he ordered the State to an-

swer the petition. Interests of comity, finality, federalism, and judicial economy cannot overcome the plain language of the applicable rules; in any event, those interests are sufficiently protected by a court's ability to dismiss a petition *sua sponte* before the State answers. Therefore, this Court should grant certiorari and reverse the Eleventh Circuit's erroneous ruling.

A. Under Civil Rules 8(c) And 12(b), The State Waived The Limitations Defense By Failing To Plead It.

It is well settled that in an ordinary civil case, failure to satisfy a statute of limitations is an affirmative defense, not a jurisdictional defect.[14] Thus, under the Federal Rules of Civil Procedure, a responding party must assert limitations in its responsive pleading. Fed. R. Civ. P. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively * * * statute of limitations * * * and any other matter constituting an avoidance or affirmative defense."); Fed. R. Civ. P. 12(b) ("Every defense * * * shall be asserted in the responsive pleading," except certain specified defenses not including limitations defenses).

If a party fails to raise a limitations defense in the manner required by these rules, that defense is waived.[15] Once

[14] See *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, *like a statute of limitations*, is subject to waiver, estoppel, and equitable tolling." (emphasis added)); *Vega-Encarnación* v. *Babilonia*, 344 F.3d 37, 42 (1st Cir. 2003); *Leavell* v. *Kieffer*, 189 F.3d 492, 494-95 (7th Cir. 1999).

[15] App., *infra*, 4a; 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1278, at 644-45 (3d ed. 2004) ("It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case"); *id.* at n.12 (collecting cases applying this proposition to limitations defense).

waived, the defense is lost because courts generally lack the authority to raise affirmative defenses *sua sponte*.[16]

These rules regarding affirmative defenses in "ordinary" civil cases also apply to section 2254 cases, which are a species of civil litigation. *Slack* v. *McDaniel*, 529 U.S. 473, 479 (2000) ("the Federal Rules of Civil Procedure [are] applicable as a general matter to habeas cases").[17] Indeed, this Court has recognized in several habeas cases that affirmative defenses must be raised timely or they are waived. *Gray* v. *Netherland*, 518 U.S. 152, 165-66 (1996) ("procedural default is an affirmative defense" that the State is "obligated to raise * * * or lose the right to assert the defense thereafter"); *Schiro* v. *Farley*, 510 U.S. 222, 228-29 (1994) ("The *Teague* bar to the retroactive application of new rules is not * * * jurisdictional" and "a State can waive the *Teague* bar by not raising it"); *McCleskey* v. *Zant*, 499 U.S. 467, 494 (1991) ("the government bears the burden of pleading abuse of the writ"); see also *Robinson*, 313 F.3d at 137 ("affirmative defenses under the AEDPA should be treated the same as affirmative defenses in other contexts" with respect to waiver).

[16] See *Hutcherson* v. *Lauderdale County*, 326 F.3d 747, 757 (6th Cir. 2003); *Kropelnicki* v. *Siegel*, 290 F.3d 118, 130 n.7 (2d Cir. 2002) ("The statute of limitations is an affirmative defense that is waived if not raised. As a result, we have held that a district court ordinarily should not raise a statute of limitations defense *sua sponte*." (citations and internal quotation marks omitted)).

[17] See also Habeas Rule 11; Fed. R. Civ. P. 81(a)(2); *Browder* v. *Director*, 434 U.S. 257, 269 (1978); *Henderson* v. *Campbell*, 353 F.3d 880, 898 n.26 (11th Cir. 2003) ("petitions for writs of habeas corpus are governed by the rules applicable in civil cases"); *Kiser* v. *Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) ("where the [Habeas Rules] are silent on an issue, Rule 11 compels us to follow the Federal Rules of Civil Procedure").

Courts agree that AEDPA's statute of limitations – like limitations periods in other civil contexts – "is an affirmative defense that the [S]tate bears the burden of asserting."[18] Therefore, under Civil Rules 8(c) and 12(b), the defense is waived if not asserted in the State's responsive pleading. *E.g.*, *Nardi*, 354 F.3d at 1140-41; *Scott*, 286 F.3d at 927-28. The Eleventh Circuit erred by holding otherwise.

Any remaining doubt whether a respondent in a habeas case waives the limitations defense by failing to plead it disappears upon comparing that defense with the nonexhaustion defense. Congress expressly provided that the "State shall not be deemed to have waived the exhaustion requirement * * * unless the State * * * expressly waives the requirement." 28 U.S.C. § 2254(b)(3). There is no similar provision requiring that a waiver of AEDPA's statute of limitations be express. *Cf. Franklin* v. *Johnson*, 290 F.3d 1223, 1231 (9th Cir. 2002) (holding that State waived procedural default argument by failing to raise it in its responsive pleading because "28 U.S.C. § 2254(b)(3)'s reference to exhaustion has no bearing on procedural default defenses").

Congress knew how to preclude waiver by omission, but it did not do so with regard to AEDPA's statute of limitations defense.[19] See *Nardi*, 354 F.3d at 1141; 2 Randy Hertz &

[18] *Hill* v. *Braxton*, 277 F.3d 701, 705 (4th Cir. 2002); see also *Acosta* v. *Artuz*, 221 F.3d 117, 122 (2d Cir. 2000) ("The AEDPA statute of limitations is not jurisdictional, and nothing in AEDPA or in the 2254 Habeas Rules indicates that the burden of pleading the statute of limitations has been shifted from the respondent to the petitioner. The AEDPA statute of limitations is therefore an affirmative defense * * *."); *Kiser*, 163 F.3d at 329; cases discussed in Part I.A., *supra*.

[19] For this reason, *Granberry* v. *Greer*, 481 U.S. 129 (1987), and similar cases addressing a State's failure to assert a nonexhaustion defense are inapposite. In *Granberry*, the Court noted that the "history of the exhaustion doctrine" shows that courts are not obligated

James S. Liebman, *Federal Habeas Corpus Practice & Procedure* § 22.1, at 933 (4th ed. 2001). Accordingly, the State waived that defense by failing to plead it.

The State also waived the limitations defense for a second, independent reason: it expressly conceded in its answer that Day's petition was timely. Dkt. No. 7, at 3 ("Respondent agrees the petition is timely; filed after 352 days of untolled time."); see *Green* v. *United States*, 260 F.3d 78, 84-85 (2d Cir. 2001) (enforcing express waiver of limitations defense). The Eleventh Circuit attempted to excuse the State from this concession by labeling it "patently erroneous." App., *infra*, 4a. The courts of appeals are divided, however, regarding whether the State's concession was in fact erroneous.

In the Eleventh Circuit's view, Day's petition was untimely because the tolling period for state collateral review ended when the Florida Court of Appeal issued its mandate, not when Day's time to seek certiorari review of that court's decision expired. See p. 8, *supra*; App., *infra*, 16a (timeline). The Sixth Circuit has concluded, however, that the tolling period for review of a state post-conviction application lasts "until the conclusion of the time for seeking Supreme Court review of the state's final judgment on that application independent of whether the petitioner actually petitions the Supreme Court to review the case." *Abela* v. *Martin*, 348 F.3d 164, 172-73 (6th Cir. 2003) (en banc).[20] Under this rule, Day's petition was timely and the State's express concession

to regard the State's omission as an absolute waiver of the claim. *Id.* at 133. The same is not true with regard to the affirmative defense of limitations.

[20] The Sixth Circuit has applied the rule of *Abela* to find several habeas petitions timely that would have been barred under the Eleventh Circuit's view. *E.g.*, *Hudson* v. *Kapture*, 107 Fed. Appx. 466 (6th Cir. 2004); *Freeman* v. *Tibbals*, 83 Fed. Appx. 707 (6th Cir. 2003) (per curiam).

of that fact should have been given binding effect. See App., *infra*, 16a. This disagreement among the circuits further illustrates the importance of the questions presented by this petition.

The Sixth Circuit's sound rule is supported by this Court's cases.[21] In contrast, the Eleventh Circuit's view would produce an unstable limitations scheme and encourage the filing of unnecessary certiorari petitions. *Abela*, 348 F.3d at 171-72. The Court need not resolve this disagreement in order to decide this case, however. Even if the State could be excused from its express waiver of the limitations defense, it nevertheless forfeited that defense by failing to plead it as required by the Civil Rules. See *Scott*, 286 F.3d at 927 n.3 (discussing distinction between waiver and forfeiture). The remaining question is whether the magistrate judge was permitted to undo the State's forfeiture.

B. Habeas Rule 4 Does Not Authorize A Court To Dismiss A Petition *Sua Sponte* After The State Has Answered.

The Eleventh Circuit acknowledged that in an ordinary civil case, a party's failure to plead a statute of limitations defense waives (*i.e.*, forfeits) that defense. Yet it held that habeas cases are an exception to this rule. According to the court, "[t]he critical difference between the ordinary civil case and a habeas case involves Rule 4 of the Rules Governing Section 2254 cases." App., *infra*, 5a.

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[21] See *Clay* v. *United States*, 537 U.S. 522, 525 (2003) (one-year limitations period for § 2255 motion does not start until the time for filing a certiorari petition expires even if no petition is filed); *Carey* v. *Saffold*, 536 U.S. 214, 217, 219-21 (2002) (for tolling purposes, state post-conviction application remains pending during the period between a state court's decision and the litigant's appeal to the next court).

The court attempted to support its holding by quoting one sentence of Rule 4. *Ibid.* The remainder of the rule, however, contains important restrictions that the court ignored. Rule 4, which governs the judge's "[p]reliminary [c]onsideration" of a habeas petition, provides:

> "The original petition shall be presented promptly to * * * [and] examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal * * *. ***Otherwise*** the judge shall order the respondent to file an answer * * *." Habeas Rule 4 (emphasis added).

The plain language of this rule authorizes a district court to dismiss a petition *sua sponte* only as part of the preliminary review it conducts before ordering the State to file an answer. *Acosta* v. *Artuz*, 221 F.3d 117, 123 (2d Cir. 2000) (rule empowers court to "dismiss habeas petitions *prior* to any responsive pleading by the [S]tate" (emphasis added)). The rule's use of the word "otherwise" confirms that considering dismissal and ordering an answer are sequential steps. See Habeas Rule 4 (as amended effective Dec. 1, 2004) ("*If the petition is not dismissed*, the judge must order the respondent to file an answer * * *." (emphasis added)); *Granberry* v. *Greer*, 481 U.S. 129, 135 n.7 (1987) (same). Thus, Rule 4 did not permit the magistrate judge to dismiss Day's petition *sua sponte* nearly one year after ordering the State to file an answer.[22] *Scott*, 286 F.3d at 930 ("the ability to dis-

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[22] Because Rule 4 does not address post-answer dismissals in any manner, much less in a manner inconsistent with the Civil Rules, those rules govern consideration of the limitations defense. See n.17, *supra*. Under the Civil Rules, the State waived the defense. See Part II.A., *supra*.

miss habeas petitions *sua sponte* * * * expires when the judge orders a respondent to file an answer").

This Court has criticized *sua sponte* rulings, including in the habeas context, on the ground that the most fair and efficient way to resolve disputes is through briefing and argument by both parties. See *Trest* v. *Cain*, 522 U.S. 87, 92 (1997). Because habeas is an adversarial remedy, not an inquisitorial one, *sua sponte* consideration of defenses by courts must be carefully confined to the limits of the rules. See *Ulster County Ct.* v. *Allen*, 442 U.S. 140, 154 n.13 (1979) (noting that State was an adversary in habeas litigation); *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").

Rule 4's distinction between pre- and post-answer dismissals is not an arbitrary one. It reflects the time-honored principle of the Civil Rules that affirmative defenses not asserted in a responsive pleading are waived. If a court could "cure" such waivers by raising defenses *sua sponte*, this aspect of the rules would be meaningless.[23] The Eleventh Circuit erred by departing from the Civil Rules and holding that Rule 4 allowed the magistrate judge to cure the State's waiver.

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[23] *Haskell v. Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988) ("Since [limitations] is a waivable defense, it ordinarily is error for a district court to raise the issue *sua sponte*. Otherwise, the waiver aspect of Rule 8(c) would have little meaning.") (citations omitted); see also *Scott*, 286 F.3d at 930 (*sua sponte* dismissal after State answered "was an impermissible curing of the [State's] waiver").

C. Interests Of Comity, Finality, Federalism, And Judicial Economy Cannot Overcome The Rules' Plain Text And Are Sufficiently Protected By The Power To Grant Pre-Answer *Sua Sponte* Dismissals.

The Eleventh Circuit also attempted to justify *sua sponte* enforcement of AEDPA's statute of limitations on the ground that it "fulfills the purposes of AEDPA" and promotes comity, finality, and federalism. App., *infra*, 5a-6a. Similarly, a few other courts have concluded that *sua sponte* action is appropriate because a habeas proceeding "implicates values beyond the concerns of the parties." *Acosta*, 221 F.3d at 123;[24] see also *Long*, 393 F.3d at 402-04; *Scott*, 286 F.3d at 932-33 (Stafford, D.J., dissenting).

This argument for post-answer *sua sponte* dismissals not only contravenes the plain text of Habeas Rule 4 and Civil Rules 8(c) and 12(b), it also eviscerates the very principle of waiver. See *Haskell v. Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988). The doctrine of waiver assumes that a party is in the best position – better even than the court – to know when its own interests are at stake. This premise is no less true in the context of habeas cases. *Ulster County Ct.*, 442 U.S. at 154; see *Castro* v. *United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.").[25] The Eleventh Circuit erred by disregarding it here.

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[24] In *Acosta*, however, the dismissal occurred before the State answered. 221 F.3d at 119-21.

[25] See also *Esslinger* v. *Davis*, 44 F.3d 1515, 1527-28 (11th Cir. 1995) ("In a given case, * * * the state is in the best position to know whether, in the interest of justice, its rule needs – indeed,

Waiver also prevents litigants from strategically "withhold[ing] * * * a defense until after the 'main event' * * * is over." *Granberry*, 481 U.S. at 132. By authorizing lower courts to cure waiver, the Eleventh Circuit removed this disincentive to strategic behavior.

Moreover, the interests of judicial economy, comity, federalism, and finality are already well protected by a court's ability to dismiss a habeas petition *sua sponte* under Rule 4 before the State has answered. See *Scott*, 286 F.3d at 930 n.10. A petition that, on its face, cannot support relief may be dismissed *sua sponte* as an initial matter. A petition without such plain defects, however, should be subject to the adversarial process, in which it is each party's burden to raise appropriate claims and defenses.[26]

Indeed, if the potential for abuse of the writ of habeas corpus justified *sua sponte* dismissal at any time, this Court would not have held in *McCleskey* v. *Zant* that when a prisoner files a second or successive application, the government bears the burden of pleading abuse of the writ. 499 U.S. at 494. Nor would the Court have held in *Trest* that a court of appeals is not required to raise the issue of procedural default *sua sponte*. 522 U.S. at 89-91. If the interests asserted by the Eleventh Circuit trumped the law applicable to civil litigation generally, then the Court would have placed the burden of determining the viability of habeas petitions on courts rather than State respondents. It did not.

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deserves – federal court vindication. Accordingly, when, as here, the state waives a habeas petitioner's procedural default in failing to obtain appellate review of a claim, the district court should assume that the waiver is justified."); 2 Hertz & Liebman, *supra*, § 22.1, at 937 & n.49.

[26] See *Falconer* v. *Lane*, 905 F.2d 1129, 1135 (7th Cir. 1990) ("waiver is not an obstacle reserved for habeas petitioners alone"); 2 Hertz & Liebman, *supra*, § 22.1, at 933-37 & nn.44-47.

Because the State failed to carry its burden here by raising the limitations defense in the district court, the Eleventh Circuit erred in affirming the dismissal of Day's petition as untimely. This Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2005

APPENDIX

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-10778
Non-Argument Calendar

D. C. Docket No. 03-00015-CV-3-MCR-MD

PATRICK DAY,

Petitioner-Appellant,

versus

JAMES CROSBY,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(November 29, 2004)

Before TJOFLAT, DUBINA and PRYOR, Circuit Judges.

PER CURIAM:

Patrick Day, a Florida prisoner, appeals *pro se* the dismissal of his petition for a writ of habeas corpus under 28

U.S.C. section 2254. The district court dismissed Day's petition *sua sponte* after deciding that it was untimely under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), even though the state erroneously conceded that Day's petition was timely. We granted Day a certificate of appealability to determine whether the district court could *sua sponte* dismiss an untimely petition despite a concession of timeliness by the state. We conclude that a concession of timeliness that is patently erroneous does not compromise the authority of a district court to dismiss *sua sponte* a habeas petition that is untimely, under AEDPA, which was enacted to promote finality of state criminal judgments. We affirm.

I. BACKGROUND

On September 3, 1998, Day was convicted of second-degree murder and sentenced to imprisonment for 55 years. After the Florida First District Court of Appeals affirmed Day's conviction and sentence, the limitation period for Day to obtain federal habeas relief began to run on March 20, 2000. On March 9, 2001, Day filed a collateral attack under Florida Rule of Criminal Procedure 3.850, which tolled the limitation period for filing a habeas petition until December 3, 2002, when the First District Court of Appeals issued its mandate for the denial of collateral relief for Day. *See Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000). By then, Day had used 353 of his allotted 365 days under the statute of limitations. He had until December 16, 2002, to file a federal habeas petition, but did not file for federal habeas relief until January 8, 2003, after the statute of limitations had run.

A federal magistrate judge acknowledged that Day's petition was "in proper form" and ordered the state to file an answer. The order directed the state to make all arguments regarding potential failure to exhaust state remedies or procedural default. The order stated that those arguments would be waived if not addressed in the answer, but the order did

not mention the statute of limitations. The answer of the State of Florida erroneously asserted that "[the state] agrees that the petition is timely; [*sic*] filed after 352 days of untolled time" and then addressed Day's substantive arguments. In December 2003, the court *sua sponte* issued an order to show cause why Day's petition should not be dismissed as untimely.

Day made three arguments against dismissal. Day first argued that the court should not dismiss his complaint after it had been pending for a year without any suggestion that it was untimely. Day argued second that he had 90 days from the denial of his motion for rehearing on collateral appeal to file a petition for a writ of certiorari in the United States Supreme Court. Under his calculation, the limitation period for filing his federal habeas petition did not run until 90 days after November 15, 2002. Day's third argument was that the state public defenders withheld his trial transcript for 352 days, and the delay cost him time in which he could have worked toward filing his appeals.

The magistrate judge recommended dismissal of Day's habeas petition. The magistrate judge concluded that *Coates v. Byrd*, which held that the 90-day period for seeking certiorari review in the United States Supreme Court on collateral appeal does not toll the limitations period for filing a federal habeas petition, foreclosed Day's argument. 211 F.3d 1225, 1227 (11th Cir. 2000). The magistrate judge also recommended that Day's argument regarding the trial transcripts did not meet the standard for equitable tolling under section 2244. In his objection to the report and recommendation of the magistrate judge, Day argued for the first time that the concession of timeliness by the state was dispositive.

The district court adopted the magistrate judge's report, dismissed Day's petition, and denied Day's certificate of appealability. We granted a certificate of appealability to determine "[w]hether the district court erred in addressing the

timeliness of appellant's habeas corpus petition, filed pursuant to 28 U.S.C. § 2254, after the appellee had conceded that appellant's petition was timely."

II. STANDARD OF REVIEW

We review *de novo* the dismissal of a habeas petition as time-barred. *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000).

III. DISCUSSION

Two years ago, we held that, after the state has filed a response to a habeas petition that does not raise the statute of limitations as an affirmative defense, a district court may dismiss a habeas petition *sua sponte* because the limitations period of one year, under AEDPA, has expired. *Jackson v. Sec'y for the Dep't of Corrs.*, 292 F.3d 1347, 1349 (11th Cir. 2002). We joined the Second, Fourth, Fifth, and Ninth Circuits and ruled that, "even though the statute of limitations is an affirmative defense, the district court may review *sua sponte* the timeliness of the section 2254 petition." *Id.* (citing *Acosta v. Artuz*, 221 F.3d 117, 124 (2d Cir. 2000); *Hill v. Braxton*, 277 F.3d 701, 706 (4th Cir. 2002); *Kiser v. Johnson*, 163 F.3d 326, 329 (5th Cir. 1999); *Herbst v. Cook*, 260 F.3d 1039, 1042 (9th Cir. 2001)). *Jackson* controls the resolution of this appeal.

This appeal presents a distinction without a difference; there is no meaningful difference between an erroneous failure to plead the statute of limitations as an affirmative defense, as occurred in *Jackson*, and a concession of timeliness that was patently erroneous, as occurred here. In an ordinary civil case, a "failure to plead the bar of the statute of limitations constitutes a waiver of the defense." *Day v. Liberty Nat'l Life Ins. Co.*, 122 F.3d 1012, 1015 (11th Cir. 1997); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1009 (11th Cir. 1989). But a habeas case that is governed by AEDPA is not controlled by this rule. Under *Jackson*, a failure to plead

the defense does not bar the district court from raising the issue *sua sponte* and ordering the petitioner to show cause why the petition should not be dismissed.

The critical difference between the ordinary civil case and a habeas case involves Rule 4 of the Rules Governing Section 2254 cases. That rule states, "If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified." The Fifth, Fourth, and Second Circuits have concluded that "[t]his rule differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses." *Kiser*, 163 F.3d at 328; *see also Acosta*, 221 F.3d at 23; *Hill*, 277 F.3d at 705. The Advisory Committee Notes to Rule 4 state that a federal district court has "the duty . . . to screen out frivolous applications."

In a pre-AEDPA decision, this Court held that, although "in [habeas] cases circumstances may counsel that the district court raise *sua sponte* a procedural bar to relief that the state has 'waived,'" the district court must consider whether the dismissal "serves an important federal interest." *Esslinger v. Davis*, 44 F.3d 1515, 1524 (11th Cir. 1995). *Esslinger* is distinguishable. *Esslinger* concerned procedural default in state court under state law. Here the district court examined the record and determined that the state erroneously conceded the timeliness of a federal statute of limitations. A federal court that sits in collateral review of a criminal judgment of a state court has an obligation to enforce the federal statute of limitations. When it enacted AEDPA, Congress circumscribed our review in habeas cases to promote comity, finality, and federalism, and Congress enacted the AEDPA statute of limitations as the principal tool to "serve[ ] the well-recognized interest in the finality of state court judgments." *Duncan v. Walker*, 533 U.S. 167, 179, 121 S. Ct. 2120, 2128

(2001); *see also Williams v. Taylor*, 529 U.S. 420, 436, 120 S. Ct. 1479, 1490 (2000).

Day brings to our attention that the Sixth Circuit has reached a contrary result. *Scott v. Collins*, 286 F.3d 923 (6th Cir. 2003). In *Scott*, a divided panel of the Sixth Circuit held that "[a] district court's ability to dismiss a habeas petition *sua sponte* as an initial matter (after giving the petitioner notice and an adequate opportunity to be heard) does not amount to a power to cure *sua sponte* a party's waiver of an affirmative defense." *Id.* at 930. The dissent reasoned that because exhaustion and procedural default could be raised *sua sponte*, "[t]here is no reason why the statute of limitations – also an affirmative defense which may be waived by the respondent – should be treated differently." *Id.* at 934 (Stafford, J., dissenting). The Ninth Circuit has followed *Scott*, *Nardi v. Stewart*, 354 F.3d 1134, 1141 (9th Cir. 2004), but our precedent in *Jackson* is binding and requires us to part with the Sixth and Ninth Circuits.

This *sua sponte* dismissal differs significantly from other *sua sponte* rulings that the Supreme Court has criticized. In *Calderon v. Thompson*, the Supreme Court was unanimous as to one point: it refused to "condone" the efforts of a court to recall its own mandate "as a mechanism to frustrate" the requirements Congress imposed under AEDPA. 523 U.S. 538, 569, 118 S. Ct. 1489, 1507 (1998) (Souter, J., dissenting), *accord id.* at 553-54, 118 S. Ct. at 1500-01 (majority opinion). Our decision, in contrast, fulfills the purposes of AEDPA by enforcing its limitation period.

IV. CONCLUSION

A concession of timeliness by the state that is patently erroneous does not compromise the authority of a district court *sua sponte* to dismiss a habeas petition as untimely, under AEDPA. The judgment of the district court is, therefore,

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PATRICK A. DAY,
Petitioner,

v. 3:03cv15/MCR/MD

JAMES V. CROSBY, JR.,
Respondent.
_____/

ORDER

This cause comes on for consideration upon the magistrate judge's report and recommendation dated January 6, 2004. The petitioner has been furnished a copy of the report and recommendation and has been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1), and I have made a *de novo* determination of those portions to which an objection has been made.

Having considered the report and recommendation and all objections thereto timely filed, I have determined that the report and recommendation should be adopted.

Accordingly, it is now ORDERED:

The petition for writ of habeas corpus (doc. 1) challenging the conviction and sentence in *State of Florida v. Patrick A. Day*, in the Circuit Court of Escambia County, Florida, case no. 97-4411, is DISMISSED and the clerk is directed to close the file.

DONE AND ORDERED this 21st day of January, 2004.

s/ M. Casey Rodgers
M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PATRICK A. DAY,
Petitioner,

v. 3:03cv15/MCR/MD

JAMES V. CROSBY, JR.,
Respondent.

REPORT AND RECOMMENDATION

Before the court is a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 (doc. 1). Respondent filed an answer (doc. 7), to which petitioner responded (doc. 9). Upon review, it appeared to the undersigned that the petition was time-barred. Accordingly, petitioner was ordered to show cause why his petition should not be dismissed as untimely (doc. 11). Petitioner has responded to the order (doc. 13). The matter is referred to the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636 and N.D. Fla. Loc. R. 72.2(B). After careful consideration of all issues raised by petitioner, it is the opinion of the undersigned that no evidentiary hearing is required for the disposition of this matter, Rules Governing Section 2254 Cases 8(a). It is further the opinion of the undersigned that the pleadings and attachments before the court show that the petition is untimely and should be dismissed.[1]

---

[1] The district court has the discretion to raise *sua sponte* the timeliness of a state prisoner's habeas petition. *Jackson v. Secretary for the Dep't of Corrections*, 292 F.3d 1347, 1349 (11th Cir. 2002).

BACKGROUND

In 1997, petitioner was charged with first-degree premeditated murder with a weapon in the Escambia County Circuit Court, case number 97-4411. (Doc. 7, Ex. A-3).[2] He was found guilty by jury verdict of second-degree murder, a lesser included offense. (*Id.*). On October 14, 1998, petitioner was adjudicated guilty of second-degree murder and sentenced to an upward departure sentence of 55 years incarceration. (Exs. B & C). On appeal of his conviction, petitioner challenged only his upward departure sentence (Ex. D). The Florida First District Court of Appeal ("First DCA") affirmed petitioner's sentence in a written opinion filed December 21, 1999. *Day v. State*, 746 So.2d 1219 (Fla. 1st DCA 1999) (Table) (copy at Ex. G).

PROCEDURAL HISTORY

On March 9, 2001 petitioner filed a motion for post-conviction relief pursuant to FLA.R.CRIM.P. 3.850, in which he raised five grounds of ineffective assistance of trial counsel. (Ex. I). The trial court denied the motion in a written order dated February 26, 2002 (Ex. J). That same day, petitioner signed (and filed) an amended motion for post-conviction relief pursuant to FLA.R.CRIM.P. 3.850, in which he raised the previous five grounds and one new ground of ineffective assistance. (Ex. K). The trial court construed the amended motion as a second motion under FLA.R.CRIM.P. 3.850 and, on March 13, 2002, denied relief on the merits (Ex. L, Order Denying Defendant's Second Motion For Post-conviction Relief). Petitioner filed a notice of appeal on March 15, 2002, in which he appealed "the denial of his Motion for Post Conviction relief rendered on February 26, 2002." (Ex. L, Notice of Appeal). The First DCA affirmed the denial order without written opinion on October 9, 2002.

---

[2] Hereafter all references to exhibits will be to those attached to Doc. 7 unless otherwise noted.

Day v. State, 833 So.2d 122 (Fla. 1st DCA 2002) (Table) (copy at Ex. O). The mandate issued on December 3, 2002. (Ex. P). Petitioner filed the instant federal habeas petition on January 8, 2003.[3] (Doc. 1).

DISCUSSION

Because petitioner filed this § 2254 petition after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the AEDPA governs the present petition. *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Pursuant to 28 U.S.C. § 2244, a one-year period of limitation applies to the filing of a federal habeas corpus petition by a person in custody pursuant to a state court judgment. The limitation period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

[3] Although petitioner signed his petition on January 7, 2003, (doc. 1, p. 17), the institutional stamp bearing petitioner's initials indicates that petitioner provided the petition to prison officials for mailing on January 8, 2003 (*id.*, p. 1).

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

§ 2244(d)(1). According to the tolling provision of § 2244(d), the time during which a "properly filed" application for state postconviction or other collateral review is pending shall not be counted toward any period of limitation. 28 U.S.C. § 2244(d)(2).

In the instant case, petitioner has not asserted that a government-created impediment to his filing existed, that he bases his claim on a right newly recognized by the Supreme Court, or that the facts supporting his claim could not have been discovered through the exercise of due diligence before the filing of this petition. Thus, the statute of limitations must be measured from the remaining trigger, which is the date on which his conviction became final. *See* 28 U.S.C. § 2244(d)(1).

The First DCA affirmed petitioner's conviction on December 21, 1999. Petitioner did not seek review of his conviction in the Florida Supreme Court or in the United States Supreme Court. Thus, the one-year limitations period began to run 90 days after the First DCA's decision issued.[4] *Bond v. Moore*, 309 F.3d 770 (11th Cir. 2002) (for purposes of § 2244(d)(1)(A), the one-year limitations period began to run when the time expired for filing a petition for certiorari with the United States Supreme Court); *Jackson v. Secretary for the Dep't of Corrections*, 292 F.3d 1347, 1349 (11th Cir. 2002); *accord Kaufman v. United States*, 282 F.3d 1336 (11th Cir. 2002) (applying same rule to motion filed under 28

[4] The 90-day period for filing in the United States Supreme Court a petition for a writ of certiorari seeking review of a decision of a state appellate court from the date of the state court's opinion, not the date of issuance of the mandate. *See* SUP. CT. R. 13.3.

U.S.C. § 2255). Accordingly, for purposes of § 2244 petitioner's conviction became final on March 20, 2000, and the § 2244 limitations period began to run.

Calculating the time period from March 20, 2000, 353 days elapsed before petitioner filed his first Rule 3.850 motion. This motion was pending from March 9, 2001 (the date it was filed) until December 3, 2002 (the date the First DCA issued the mandate on petitioner's appeal of the order denying relief).[5] The clock began to run once more on December 3, 2002, and expired 12 days later on December 16, 2002.[6] Petitioner did not file his federal habeas petition until January 8, 2003. Based on the foregoing, the habeas petition is untimely.

In response to the court's show cause order, petitioner argues that his Rule 3.850 motion for post-conviction relief was "pending," within the meaning of § 2244(d)(2), until expiration of the 90-day period in which he could have petitioned the United States Supreme Court for certiorari review of the denial of his motion. The Eleventh Circuit has expressly rejected this argument. *Coates v. Byrd*, 211 F.3d 1225 (11th Cir. 2000) (holding that "the time during which a petition for writ of certiorari is pending, or could have been filed, following denial of collateral relief in the state courts, is not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1)"); *see, e.g., Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (affirming district court's conclusion that a petition for writ of certiorari to the United States Supreme Court does not toll the statute of limitations under

[5] *See Nyland v. Moore*, 216 F.3d 1264 (11th Cir. 2000) (recognizing that a "properly filed" state postconviction petition is "pending" under Florida procedure – and consequently tolls the limitations period – until the appellate court's issuance of the mandate on appeal).

[6] December 15, 2002 was a Sunday. *See* FED.R.CIV.P. 6(a).

§ 2244(d)(2)), *cert denied*, 531 U.S. 1166, 121 S.Ct. 1129, 148 L.Ed.2d 995 (2001).

Additionally, petitioner offers the following explanation for the 353-day delay in filing his first Rule 3.850 motion:

> For 352 days the Petitioner sat in state custody demanding his trial transcripts which were being kept from him by public defenders who were passing it amongst themselves.
>
> Long after the formal appeal was disposed of the public defenders . . . purposly [sic] kept the transcripts from the Defendant. Petitioner needed the trial transcripts for his ineffective claim and filed a complaint with the Florida Bar. No action was taken.

(Doc. 13, p. 2).

It is noted that "[s]ection 2244 . . . permits equitable tolling 'when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.'" *Steed v. Head*, 219 F.3d at 1300 (citing *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999)). Petitioner's assertions are insufficient to justify application of the equitable tolling doctrine. He asserts that he needed his trial transcript in order to prepare his Rule 3.850 motion, and that the public defenders' office ignored his repeated requests for the transcript for 352 of the 353 days the limitations period was running. First, it is noted that nothing in Fla.R.Crim.P. 3.850 requires the movant either to attach a transcript or to provide citations to the transcript. Further, petitioner makes no specific allegation why the trial transcript was necessary in light of the fact that he experienced the full trial. *See e.g., Lloyd v. Vannatta*, 296 F.3d 630, 633 (7th Cir. 2002) ("it is clear that the state's alleged refusal

here to provide Mr. Lloyd with a complete transcript does not justify equitable tolling"); *Donovan v. Maine*, 276 F.3d 87, 93 (1st Cir. 2002) ("the state court's delay in furnishing the petitioner with the transcript did not establish a basis for equitable tolling" where petitioner failed to establish that "he needed that transcript in order to file a federal habeas application"); *Jihad v. Hvass*, 267 F.3d 803, 806 (8th Cir. 2001) ("lack of access to a trial transcript does not preclude a petitioner from commencing post-conviction proceedings and therefore does not warrant equitable tolling"); *Brown v. Cain*, 112 F.Supp.2d 585, 587 (E.D. La. 2000) (one-year limitation period for filing habeas petition would not be equitably tolled, despite petitioner's claim that he had spent much of seventeen month period between conviction and filing of application for post-conviction relief waiting for state to produce transcripts, absent showing that transcripts were needed to file application).

Moreover, even accepting as true petitioner's assertion that he needed the trial transcript, his own allegations suggest that he was able to file his Rule 3.850 motion within a remarkably short time after receiving the transcript – a mere day. Petitioner fails to explain why, with the exercise of that same diligence, he was unable to file his federal habeas petition within the twelve days following issuance of the mandate on his Rule 3.850 appeal. In fact, he alleges *no* facts to suggest that he attempted to file his federal habeas petition within those twelve days, much less that he diligently attempted to do so. The deficiency of petitioner's allegations is highlighted by the fact that petitioner has contended throughout this proceeding that all the grounds raised in his federal habeas petition were raised in his Rule 3.850 motion (see Doc. 1, pp. 5, 7, 8, 10, 11, 13; Doc. 9, p. 2). Because petitioner has not alleged specific facts which if true would entitle him to relief, he is not entitled to a hearing or equitable tolling.

CONCLUSION

The instant petition for writ of habeas corpus is untimely. The record does not support application of the equitable tolling doctrine or any other exception to the limitations period. Based on the foregoing, the petition should be dismissed.

Accordingly, it is respectfully RECOMMENDED:

That the petition for writ of habeas corpus (doc. 1) challenging the conviction and sentence in *State of Florida v. Patrick A. Day*, in the Circuit Court of Escambia County, Florida, case no. 97-4411, be DISMISSED and the clerk be directed to close the file.

At Pensacola, Florida this 6th day of January, 2004.

/s Miles Davis
MILES DAVIS
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Any objections to these proposed findings and recommendations must be filed within ten days after being served a copy hereof. A copy of any objections shall be served upon all other parties. Failure to object may limit the scope of appellate review of factual findings. *See* 28 U.S.C. § 636; *United States v. Roberts*, 858 F.2d 698, 701 (11th Cir. 1988).

APPENDIX D

List Of Dates Relevant To Limitations Issues

Direct appeal

Dec. 21, 1999	Florida Court of Appeal affirms Day's sentence on direct appeal.
March 20, 2000	Last day to file petition for writ of certiorari from court of appeal's decision.

– 353 days –

State post-conviction review

March 9, 2001	Day files motion for post-conviction relief under Florida law.
Oct. 9, 2002	Florida Court of Appeal affirms denial of post-conviction relief.
Nov. 15, 2002	Motion for rehearing denied.
Dec. 3, 2002	Mandate issued.
Feb. 13, 2003	Last day to file petition for writ of certiorari from court of appeal's decision.

Federal habeas review

Jan. 8, 2003	Day mails federal habeas petition.

Supreme Court, U.S.
FILED
JUL - 8 2005
OFFICE OF THE CLERK

(4)

Case No. 04-1324

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK A. DAY, *Petitioner*,

vs.

JAMES V. CROSBY, JR. Secretary, Florida
DEPARTMENT OF CORRECTIONS, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

[Petitioner's Version]

1. Does the State waive a limitation defense to a habeas corpus petition when it fails to plead or otherwise raise that defense and expressly concedes that the petition was timely?

2. Does Habeas Rule 4 permit a district court to dismiss a habeas petition *sua sponte* after the State had filed an answer based on a ground not raised in the answer?

[Restated by Respondent]

Does public policy underlying the AEDPA allow a district court to sua sponte apply the limitation period in 28 U.S.C. §2244(d)(1) **whenever** a habeas petition appears untimely, absent prejudice to the petitioner?

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Case No. 04-1324

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK A. DAY, *Petitioner*,

vs.

JAMES V. CROSBY, JR. Secretary, Florida
DEPARTMENT OF CORRECTIONS, *Respondent.*

OPINIONS BELOW

Respondent accepts Day's statement.

JURISDICTION

Respondent accepts Day's statement.

STATUTORY PROVISIONS INVOLVED

Respondent accepts Day's statement, but adds: current Habeas Rule 4 provides in relevant part:

> If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.

Current Habeas Rule 11 provides in relevant part:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provision or

these rules, may be applied to a proceeding under these rules.

STATEMENT OF THE CASE

The crucial issue is whether a state habeas petitioner can wield the rules of civil procedure to keep a windfall; that is, the mistaken concession his habeas petition was timely. Day would do so--flatly contradicting the strong concern for comity, federalism and finality in the Anti-terrorism & Effective Death Penalty Act (AEDPA)--while not disputing his habeas petition was late and in the absence of prejudice.

Day, a state prisoner, is serving 55 years for second-degree murder with a weapon. (cert. pet., p.4). Responding to his federal habeas petition, Respondent miscalculated the amount of the limitation period[1] which had elapsed. Based on this mistake, Respondent conceded the petition was timely and answered on the merits. But for the miscalculation, he would not have done so.[2]

Factually, Day's petition was late from the outset. The district court recognized the potential time bar, and issued an order for Day to show cause why his petition should not be dismissed. Upon Day's reply, the court found 353 days elapsed while Day had nothing pending[3] in the state courts. Twelve days later, the limitation period expired. Because Day did not file his habeas petition for 23 more days, the petition was untimely. *See* Magistrate's Report and Recommendation. (Pet. App., p. 12a).[4]

All of this occurred very early in Day's habeas proceeding. His petition had been accepted. It and Respondent's answer were being considered in due course, when the district court raised the possibility the petition was filed too late. Respondent sought summary denial on the merits; there had been no discovery or evidentiary hearing.

Under these facts, the Eleventh Circuit described Respondent's concession as "patently erroneous,"without more. *See e.g.*, 391 F.3d at 1192. It also made two observations which lie at the heart of its decision:

> This appeal presents a distinction without a difference; there is no meaningful difference between an erroneous failure to plead the statute of limitations as an affirmative defense, as occurred in *Jackson*, and a concession of timeliness that was patently erroneous, as occurred here. In an ordinary civil case, a failure to plead the bar of the statute of limitations constitutes a waiver of the defense. But a habeas case that is governed by AEDPA is not controlled by this rule. Under *Jackson*, a failure to plead the defense does not bar the district court from raising the issue *sua sponte* and ordering the petitioner to show cause why the petition should not be dismissed.

* * *

---

[1] *See* 28 U.S.C. §2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.").

[2] Counsel for Respondent correctly determined the number of days of untolled time which elapsed during Day's state court proceedings, but neglected to add the number of days which passed between conclusion of those proceedings and the filing of his habeas petition.

[3] *See* 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.").

[4] The appendix to Day's certiorari petition is cited (Pet. App., p.__). Throughout, emphasis supplied by Respondent is noted as [e.s.].

> A federal court that sits in collateral review of a criminal judgment of a state court has an obligation to enforce the federal statute of limitations. When it enacted AEDPA, Congress circumscribed our review in habeas cases to promote comity, finality, and federalism, and Congress enacted the AEDPA statute of limitations as the principal tool to "serve[] the well-recognized interest in the finality of state court judgments. *Duncan v. Walker*, 533 U.S. 167, 179, 121 S. Ct. 2120, 2128, 150 L. Ed. 2d 251 (2001)[.] [other citations omitted].

391 F.3d at 1194 [e.s.].

The Eleventh Circuit relied on the public policy expressed by Congress through the AEDPA. It rejected mechanistic application of a civil principle, that an affirmative defense is waived by failure to raise it. The court determined the AEDPA trumps Habeas Rule 4, as the strong purpose behind that Act cannot be defeated by a civil, procedural rule; and, in the language just quoted, found the district court had an "obligation to enforce the federal statute of limitations." *Id.*

REASONS FOR DENYING THE WRIT

I. ANY NOMINAL CONFLICT AMONG THE CIRCUIT COURTS IS NOT IMPORTANT ENOUGH TO JUSTIFY CERTIORARI REVIEW.

A. No Conflict as to Waiver of the Limitations Defense Through Failure to Raise It.

Day's habeas petition was time-barred before the district court ordered a response. Had the court recognized the that bar, it could have issued the same show cause order before any response. Day concedes at least four circuits, besides the Eleventh, have held a district court may summarily dismiss before the state answers. (cert. pet., p.11 at n.10). As observed in Bendolph, *infra*, all circuits addressing the issue have found a district court may raise the limitation period sua sponte--the only difference is when.

Absent prejudice, it does not matter *when* the limitation period is raised. To conclude otherwise is to elevate form (civil procedure) over the substance of the AEDPA.

Day asks this court to accept those decisions which treat the habeas limitation period as a civil, affirmative defense; and find conflict with the decisions that do not do so. In opposition, Respondent can do no better than these very recent observations by the Third Circuit (en banc):

> Finally, we consider the argument contra, a thumbnail sketch of which is this: Habeas cases are civil, governed by the Federal Rules of Civil Procedure. As such, the AEDPA statute of limitations must be treated like any other in a civil case. Therefore, it is a defense possessed by the habeas respondent alone, and courts may not intervene.

> The argument plainly rests on the premise that habeas cases and ordinary civil cases are indistinguishable, something we disagreed with in Long and do so again today. *See, e.g.*, Harris v. Nelson, 394 U.S. 286, 293-94, 89 S. Ct. 1082, 1087-88, 22 L. Ed. 2d 281 (1968) ("It is, of course, true that habeas corpus proceedings are characterized as 'civil.' . . . But the label is gross and inexact. Essentially, the proceeding is unique. Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense.") (internal citations and footnote omitted); Long, 393 F.3d at 402 ("While civil in nature, habeas corpus cases are different from ordinary civil cases where only the interests of the parties are involved.") (*citing* Acosta [v. Artuz, 221 F.3d 117 (2d Cir. 2000] at 123); *see also* O'Brien v. Moore, 395 F.3d 499, 505 (4th Cir. 2005) (noting the unique hybrid nature of habeas actions and collecting cases observing same); Walker v. O'Brien, 216 F.3d 626, 636 (7th Cir. 2000) (observing that habeas cases are a "group unto themselves"); Brown v. Vasquez, 952 F.2d 1164, 1169 (9th Cir. 1991) (noting habeas corpus is "dramatically different from any other type of civil action").

United States v. Bendolph, 2005 U.S. App. LEXIS 8635, 28-30 (3d Cir., May 16, 2005) (en banc). *See* Herbst v. Cook, 260 F.3d 1039, 1042 (9th Cir. 2001) (recognizing that district courts may sua sponte dismiss untimely habeas petition when notice and opportunity to respond have been given, but not considering the effect of a state response on such discretion). *See also* Kiser v. Johnson, 163 F.3d 326, 328 (5th Cir. 1999) (distinguishing habeas cases from civil litigation, and holding Habeas Rule 4 allows sua sponte dismissal of untimely petition before an answer or other pleading by the state; but without addressing prejudice).

Specifically, Day first posits conflict on the premise the Eleventh Circuit allows district courts to find a habeas petition untimely, despite a respondent's waiver of the limitation period "by failing to raise it." (cert. pet., p.9-11). Second, he asserts conflict based on the Eleventh Circuit's interpretation of Habeas Rule 4. (cert. pet., p.11-13). To reach this end, he relies on cases interpreting the former versions of Habeas Rules 4 and 11.

Current Habeas Rule 4 provides in relevant part:

> If it plainly appears from the petition . . . the petitioner is not entitled to relief in the district court, the judge must dismiss the petition[.]

Under this language, plain disentitlement to relief--such as a time-barred petition--compels dismissal. Moreover, nothing in this language or the remainder of Rule 4 expressly prohibits later dismissal due to untimeliness. To the contrary, the district court has no discretion to allow the proceeding to continue. *Cf.* Pliler v. Ford, 542 U.S. 225 (2004) (holding: "The combined effect of Rose [v. Lundy, 455 U.S. 509, 102 S. Ct. 1198 (1982)] and AEDPA's limitations period is that if a petitioner comes to federal court with a mixed petition toward the end of the limitations period, a dismissal of his mixed petition could result in the loss of all of his claims[.]").

Current Habeas Rule 11 reads:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provision or these rules, may be applied to a proceeding under these rules.

Contradicting Rule 11, Day can find conflict only by elevating Civil Rule 8(c) and 12(b) over a "statutory provision" (AEDPA). Essentially, he posits conflict by contending a

respondent's concession of timeliness can never be revisited, because the habeas limitation period is the equivalent of an affirmative, civil defense; waived when not pled under civil rules 8(c) and 12(b).

Day's position disregards the strong concern for comity underlying AEDPA. As this Court has said:

> There is no doubt Congress intended AEDPA to advance these doctrines [of comity, finality, and federalism]. Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 726, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus"); McCleskey v. Zant, 499 U.S. 467, 493, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) ("The doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments").

Williams v. Taylor, 529 U.S. 420, 436, 120 S.Ct. 1479, 1490 (2000).

This Court has similarly described the AEDPA's one-year limitation period:

> And AEDPA's limitations period--with its accompanying tolling provision--ensures the achievement of this goal because it promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments. [e.s.; internal quotes & cites omitted].

Carey v. Saffold, 536 U.S. 214, 220, 122 S.Ct. 2134, 2138 (2002).

Given the AEDPA's goal of "promoting comity," a federal court has greater flexibility in broaching the habeas limitation period than it would raise a foregone limitation period in typical civil litigation. *See* Hill v. Braxton, 277 F.3d 701, 705 (4th Cir. 2002) ("Actions brought pursuant to §2254 implicate considerations of comity ... to a degree not present in ordinary civil actions. These interests eclipse the immediate concerns of the parties and provide federal habeas courts the discretionary authority to raise affirmative defenses that have not been preserved by the state.").

In contrast to the decision below, the cases upon which Day posits conflict were decided before current Habeas Rules 4 & 11 were adopted. All elevate the civil and habeas procedural rules over federalism, comity and finality as promoted by the AEDPA. *See* Nardi v. Stewart, 354 F.3d 1134, 1141 (9th Cir. 2004) (relying on prior rule 4 and observing that "Rule 4 authorizes a summary dismissal only prior to a responsive pleading by the state[;]" without mention of rule 11 or the policy concerns of the AEDPA); Scott v. Collins, 286 F.3d 923, 931 (6th Cir. 2002) (considering prior rule 4 only, with no mention of AEDPA policy; but observing that the result reached did not "prohibit a court from dismissing a habeas petition on statute of limitations

grounds at a later time if the respondent raises the statute of limitations affirmative defense").

Day's reliance on Robinson v. Johnson, 313 F.3d 128 (3d Cir. 2002), to establish conflict is particularly unavailing, as that decision neglects the AEDPA's concern for federalism. Lastly, Day relies on Davis v. LeMaster, 216 F.3d 1086 (10th Cir.) (table), 2000 U.S. App. LEXIS 11866 (2000) (unpub.). There, the court observed in dicta that the petition was untimely. It found the issue waived because it had never been raised. Given the case was already on appeal, the court's finding of waiver is not surprising. It does not show conflict under the facts of this case.

B. No Conflict as to Habeas Rule 4.

Relying on Nardi and Scott, Day claims conflict arises because the Eleventh Circuit allows a district court to address timeliness after the habeas petition has been answered. However, the record shows only that Respondent had answered on the merits. Nothing else had happened. [5] Later, the district court issued a show-cause order questioning the timeliness of Day's petition.

The habeas proceeding was at its earliest stages when the district court *sua sponte* raised the limitation period. There had been no delay attributable to Respondent; the district court apparently was considering the petition and the answer in due course.

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[5] In all the proceedings below, Day has never contended his petition was actually filed on time. The district court found his assertions "insufficient to justify application of the equitable tolling doctrine." (Pet. App. 13a). The Eleventh Circuit's decision did not bother to address them. (Pet. App. 4a-6a).

Under Habeas Rule 6, permission leave of court must be obtained for discovery. Day had not done so. He could not have been conducting discovery during the time which passed, and did not forego anything. Restated, the concern over unnecessary delay or misguided discovery, which requires affirmative defenses to be raised early in typical civil litigation, was not present. The strictures of Civil Rule 8(c), requiring affirmative defenses to be set forth at the first responsive pleading, were not present.

To the contrary, had Respondent discovered the erroneous concession of timeliness and moved to withdraw the answer and seek dismissal; the district court would have had the discretion to allow it. *Cf.* Fed.R.Civ.P. 15 (directing that leave of court to amend pleadings "be freely given when justice so requires"); Long v. Wilson, 393 F.3d 390, 404 (3d Cir. 2004) (concluding the "District Court impliedly granted leave to amend in a proper exercise of its discretion by denying the petition as untimely").

When, as here, a habeas petition has been answered, but nothing more has happened, there is no justification for distinguishing between *sua sponte* dismissal before versus after the answer. Any nominal conflict between the decision below, and Nardi and Scott, is not important enough to justify certiorari. *See* Supreme Court Rule 10(c) (declaring, as a reason for certiorari review, that a "United States court of appeals had decided an important question of federal law that has not been, but should be, settled by this Court[.]" [e.s.]).

C. Resolution of Important Issues.

Given the AEDPA's strong underpinnings in federalism, comity, and finality of state criminal convictions; there is no reason to limit whether or when a district court can raise the limitation period in §2244(d)(1), absent prejudice to a habeas

petitioner. The Eleventh Circuit's decision was correct, and further review is not warranted.

The major flaw of Day's argument emerges, when he advocates blind reliance upon the rules of civil procedure without regard to the AEDPA and the lack of prejudice to himself. No federal decision supports his position, at least absent prejudice. *See* Bendolph, 2005 U.S. App. LEXIS 8635 at *26 (observing, in the context of a habeas petition under §2255: "[A]ll of the courts of appeals that have considered the issue agree that courts do possess a sua sponte power to raise the limitations issue[;]" noting that disagreement has arisen over when the issue can be so raised; and compiling cases).

Bendolph then focused on what should be the determinative factor--prejudice to the petitioner, rather than procedural nicety:

> Because the District Court flagged timeliness after the Rule 4 period had ended, we must next consider the ultimate issue, prejudice to Bendolph. We look first to how late in the case the limitations issue was raised. Here, as stated, the District Court raised the issue on August 24, 2000; the government, in turn, did so on October 5, 2000. These two events occurred almost two years after October 18, 1998, the date Bendolph filed his § 2255 motion. During that time, the record reflects the following activity in Bendolph's case: he filed a motion to compel discovery, which was denied; the case was reassigned upon the retirement of the District Judge; and Bendolph was ordered to make an election pursuant to United States v. Miller, 197 F.3d 644 (3d Cir. 1999). On these facts, the raising of timeliness was not so late that Bendolph was prejudiced. There is no evidence that he had commenced costly or time-consuming discovery, suffered a loss or a diminution of his ability to prepare his case, or lost another litigation opportunity elsewhere. As such, while delay is related to prejudice, and while a period of almost two years may be strong evidence of prejudice in another case, it was not a problem here. The prejudice inquiry looks next to whether Bendolph had sufficient opportunity to respond to the issue, once raised. [e.s.; cites & internal quotes omitted].

Id., 2005 U.S. App. LEXIS 8635 at *37-9.

Absent prejudice[6] to a habeas petitioner to overcome the timeliness issue, a district court has authority to raise the limitation period at any time throughout the litigation. Here, the district court sua sponte raised the timeliness issue after Respondent had answered, but before anything else had happened in the case. Under these facts, Day's petition does not present issues or caselaw of sufficient importance to justify certiorari review.

II. THE ELEVENTH CIRCUIT'S DECISION WAS NOT CONTRARY TO THE CIVIL RULES AND HABEAS RULE 4.

Day has urged the decision below conflicts with other circuit court decisions involving federal civil rules of procedure and Habeas Rule 4. Next, he advances the same allegation a free-standing ground for certiorari.

Day's position flies in the face of Gonzalez v. Crosby, case no. 04-6432, 2005 U.S. LEXIS 5014 (June 23, 2005). In essence, Gonzalez held state habeas petitioners cannot use a motion for relief from judgment under Civil Rule 60(b) to present new claims for relief. *See id.* at *12-14 (observing: "These statutes,

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[6] An example of prejudice would be that evidence justifying equitable tolling became unavailable during the pendency of the respondent's answer, only to have the court sua sponte raise the limitation defense.

and our own decisions, make clear that a 'claim' as used in § 2244(b) is an asserted federal basis for relief from a state court's judgment of conviction." and "Virtually every Court of Appeals to consider the question has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly.").

As Gonzalez explains:

> Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction--even claims couched in the language of a true Rule 60(b) motion--circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts. §2244(b)(2). The same is true of a Rule 60(b)(2) motion presenting new evidence in support of a claim already litigated: even assuming that reliance on a new factual predicate causes that motion to escape §2244(b)(1)'s prohibition of claims "presented in a prior application," §2244(b)(2)(B) requires a more convincing factual showing than does Rule 60(b). Likewise, a Rule 60(b) motion based on a purported change in the substantive law governing the claim could be used to circumvent §2244(b)(2)(A)'s dictate that the only new law on which a successive petition may rely is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." In addition to the substantive conflict with AEDPA standards, in each of these three examples use of Rule 60(b) would impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar. § 2244(b)(3).

Id. at *14-15.

The Gonzalez rationale applies with extra force here. Habeas Rule 11 was amended in a manner seeming to be a direct nod to the AEDPA, by declaring the civil rules apply when not "inconsistent with any statutory provisions." Habeas Rule 4, while literally speaking to a pre-answer dismissal, still requires dismissal when the "petition and any attached exhibits"plainly show the petitioner is not entitled to relief. Both must be interpreted to effect the AEDPA's concern for federalism and finality of state criminal judgments. That concern weighs very strongly against allowing a state prisoner to keep a windfall.

Were this not enough, an earlier passage from Gonzalez makes it clear that the absence of express limitation or modification of the Civil rules cannot trump the AEDPA:

> AEDPA did not expressly circumscribe the operation of Rule 60(b). (By contrast, AEDPA directly amended other provisions of the Federal Rules. *See, e.g.*, AEDPA, §103, 110 Stat. 1218 (amending Fed. Rule App. Proc. 22).) The new habeas restrictions introduced by AEDPA are made indirectly relevant, however, by the fact that Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only "to the extent that [it is] not inconsistent with" applicable federal statutory provisions and rules. 28 U.S.C. §2254 Rule 11; *see* Fed. Rule Civ. Proc. 81(a)(2). [footnote omitted]. [e.s.].

Id. at *10.

Here, Day would elevate inadvertent concession his habeas petition was timely into a "right" to review of his petition on the merits. In so doing, he contradicts the AEDPA's strong concern for federalism and finality of state criminal judgments, and current Habeas Rule 11. He seeks consideration on the merits of an untimely petition, based not on any equitable or statutorily-

recognized consideration, but only on an erroneous concession by Respondent. To do so, he would elevate civil procedural rules over the policy underlying the AEDPA, in the absence of prejudice or "extraordinary" consideration. *Cf. id.* at *20 ("[O]ur cases have required a movant seeking relief under Rule 60(b)(6) to show "extraordinary circumstances" justifying the reopening of a final judgment.").

Ironically, the procedural history of Gonzalez strongly supports Respondent's position here. Gonzalez moved under Rule 60(b)(6) for reconsideration of how the one-year limitation period applied to his habeas petition, in light of Artuz v. Bennett, 531 U.S. 4 (2000). He did 9 months after Artuz issued, and over a year after a certificate of appealability had been denied. Gonzalez at *6-7. While this Court ultimately agreed denial of Gonzalez's motion was correct on the merits, it held the motion was not categorically barred by the AEDPA; specifically, 28 U.S. C. §2244(b).

If the AEDPA does not to bar a motion--long after dismissal--such as the one in Gonzalez, then Day cannot rely on a strict reading of Habeas Rule 4 (and the Civil Rules as to affirmative defenses) to bar sua sponte application of the limitation period. He certainly cannot do so when the district court raised the limitation period very early in the habeas proceeding while giving him opportunity to respond, and he had never claimed the petition was timely.

The same respect for the ADEPA's one-year limitation period motivated this Court to reject the Ninth Circuit's broad application of Civil Rule 15. Describing the issue as whether, under Rule 15(c)(2), an amended habeas petition relates back to the date of the "originally timely filed petition," the court concluded:

> An amended habeas petition, we hold, does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.

Mayle v. Felix, 2005 U.S. LEXIS 5016 *12 (June 23, 2005).

Here, Day would escape the AEDPA's one-year limitation period based solely on an inadvertent concession of timeliness, in the absence of prejudice and any contention his petition was timely. Mayle also teaches the Eleventh Circuit's decision was correct, and that certiorari is not warranted.

It would be a miscarriage of justice to treat Respondent's concession of timeliness as a right vesting in Day. He cannot show prejudice, and does not dispute the lateness of his petition. The decision below comports with the authorities discussed---the AEDPA and this Court's most recent habeas jurisprudence, and current Habeas Rules 4 and 11. Day's second reason for granting the writ would elevate the rules of civil procedure above all these, and must be rejected.

One more point is necessary. Respondent relies on the current version of Habeas Rules 4 and 11, as amended in December 2004. Following Rule 4 is this committee note:

> The language of Rule 4 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

A similar note appears as to Rule 11. Intuitively, it is difficult to accept the committee's note that the changes to Rules 4 and 11

are merely stylistic or clarifying. After all, Rule 11 was changed to say the civil rules apply to "the extent that they are not inconsistent with any statutory provisions" [e.s.]--a direct acknowledgment of the AEDPA.

This Court has recently minimized the differences between the prior and current Habeas Rules. *See* Mayle at *10 n.1 ("The Habeas Corpus Rules were recently amended, effective December 1, 2004. Because the amended Rules are not materially different from those in effect when Felix filed his habeas petition, this opinion refers to the current version of the Rules."). If, then, the 2004 changes to the Habeas Rules are just stylistic and clarifying, the decision below would have reached the correct result under the prior rules. There is no misinterpretation or contradiction of the Habeas Rules in the Eleventh Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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(5)

No. 04-1324

In the Supreme Court of the United States

PATRICK A. DAY,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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The State spends little time addressing the splits among the circuits or the importance of resolving them. The State does point out that the Habeas Rules were recently amended, but those amendments are not substantive and do not affect the circuits' conflicting holdings on the questions presented. After this petition was filed, the en banc Third Circuit divided 7-5 on those questions, deepening the conflict and confirming that this Court's review is needed.

On the merits, the State argues that Day would receive a "windfall" if this Court finds a waiver of AEDPA's limitations defense. This argument ignores the many reasons why our adversary system makes parties responsible for raising their own affirmative defenses. The State next contends that Day was not prejudiced by the *sua sponte* dismissal of his petition as untimely because he never argued it was timely. Yet the record is clear: Day did argue that his petition was timely, and Sixth Circuit precedent supports his argument. Finally, the State contends that certain policies behind AEDPA trump the text of the Rules of Civil Procedure. Because nothing in AEDPA's text is inconsistent with the Civil Rules regarding waiver, however, those rules apply here. The Eleventh Circuit erred by holding otherwise.

A. The circuit splits presented here are genuine and have deepened.

The State never raised a limitations defense in the district court. To the contrary, its answer conceded that Day's petition was timely. Months later, however, the district court dismissed the petition as untimely *sua sponte*.

Six courts of appeals have now addressed this recurring factual scenario. The State does not dispute what the Eleventh Circuit expressly acknowledged and the Third Circuit has now confirmed: courts are divided over whether such a dismissal is proper. Pet. App. 6a; *United States* v. *Bendolph*, 409 F.3d 155, 164 (3d Cir. 2005) (en banc).

First, unlike the Eleventh Circuit, four circuits hold that a State waives the limitations defense by failing to plead it in an answer or otherwise raise it in the district court.[1] Second, three circuits now reject the Eleventh Circuit's view that Habeas Rule 4 authorizes *sua sponte* dismissal after an answer has been filed.[2] See Opp. 5, 12 (conceding disagreement over when district court may raise limitations *sua sponte*).

The State attempts to brush aside these splits of authority, preferring instead to argue about which position is correct on the merits. The State's few responses to the splits do not minimize their existence or the importance of resolving them.

1. The State's primary contention is that most of the circuits—including the Eleventh Circuit itself—weighed in on these splits before amendments to Habeas Rules 4 and 11 took effect on December 1, 2004. Opp. 7, 9. Yet those amendments do nothing to resolve the splits or diminish their continuing importance. As the State grudgingly concedes

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[1] Compare Pet. App. 4a (habeas case "not controlled by" rule that failure to plead limitations "constitutes a waiver") with *Bendolph*, 409 F.3d at 164 (reaffirming Third Circuit rule that "limitations period is not jurisdictional and therefore is subject to * * * waiver"); *Nardi*, 354 F.3d at 1141 (State "waives the statute of limitations by failing to raise the defense in its answer"); *Scott*, 286 F.3d at 928 (failure to raise limitations defense in first responsive pleading "amounted to a waiver"); see also Pet. 9-11.

[2] Compare Pet. App. 4a-5a (Rule 4 authorizes *sua sponte* dismissal even "after the [S]tate has filed a response * * * that does not raise" limitations defense) with *Bendolph*, 409 F.3d at 157 (case is not "within the summary dismissal period of Rule 4" after government files answer "that [does] not raise" limitations); *Nardi*, 354 F.3d at 1141 (district court "lacks the authority to *sua sponte* dismiss a habeas petition as time-barred after the [S]tate files an answer which fails to raise the statute of limitations defense"); *Scott*, 286 F.3d at 930 (Rule 4 power to dismiss petition *sua sponte* "expires when the judge orders a respondent to file an answer").

near the end of its brief (at 17-18), the advisory committee notes to both rules state (with a few exceptions not relevant here) that the amendments are simply "stylistic" and that "no substantive change is intended." Indeed, this Court confirmed just last month that the amended rules "are not materially different" from the prior versions. *Mayle* v. *Felix*, 125 S. Ct. 2562, 2566 n.1 (2005).

A review of the specific amendments to Rules 4 and 11 confirms that they do not substantively impact the circuit conflicts at issue here. Habeas Rule 4 governs the judge's preliminary examination of a habeas corpus petition. Prior to the amendments, it provided:

> If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal * * *. Otherwise the judge shall order the respondent to file an answer * * *.

The amended version provides:

> If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition * * *. If the petition is not dismissed, the judge must order the respondent to file an answer * * *.

The replacement of the word "otherwise" with the phrase "[i]f the petition is not dismissed" confirms Day's position that the district court's power to dismiss *sua sponte* ends when it orders the respondent to file an answer. Pet. 21. The State instead focuses on the replacement of "shall" with "must," arguing that a judge is now compelled to dismiss a petition *sua sponte* whenever it appears that a defense applies.[3] Opp. 7. "Must" is no more mandatory than "shall,"

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[3] To the contrary, this Court has rejected the notion that a judge is required to raise a defense *sua sponte* in the post-answer context. *Trest*, 522 U.S. at 89.

however. See *Hewitt* v. *Helms*, 459 U.S. 460, 471-72 (1983). Thus, the change will not affect the circuits' disagreement over whether Habeas Rule 4 authorizes post-answer *sua sponte* dismissals.

Habeas Rule 11 addresses the role of the Civil Rules in habeas cases. The amended version states:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with *any statutory provisions or* these rules, may be applied to a proceeding under these rules.

(emphasis added). The State argues that the italicized phrase changes the result here because applying the Civil Rules to determine waiver of affirmative defenses would be inconsistent with policies behind AEDPA. Opp. 7, 9. Yet the addition of "statutory provisions" was not a substantive change given that the parallel provision of the Civil Rules, Rule 81(a)(2), already included statutes:

> These rules are applicable to proceedings for * * * habeas corpus * * * to the extent that the practice in such proceedings is not set forth in statutes of the United States * * * [or] the Rules Governing Section 2254 Cases * * *.

Accordingly, the amendment to Habeas Rule 11 will not alter the circuits' conflicting analyses of whether the Civil Rules on waiver apply to AEDPA's limitations defense.

2. Putting aside these non-substantive changes to the Habeas Rules, the State's fall-back position is that "the decision below * * * reached the correct result under the prior rules." Opp. 18. This merits-based argument is not a reason to deny certiorari given the circuit conflicts over the result reached by the Eleventh Circuit. Part B of this brief addresses the State's position on the merits.

The State's only other assertions regarding conflict are easily dispatched. As to whether the Civil Rules on waiver apply, the State attempts to distinguish the Tenth Circuit's

waiver holding in *Davis* (see Pet. 10-11) on its facts, pointing out that the respondent there did not raise a limitations defense until appeal. Yet the same is true here: the State never mentioned—let alone advocated—a dismissal based on limitations in the district court at any time, not even after the magistrate judge raised the issue *sua sponte*.

Regarding the conflict over whether Habeas Rule 4 authorizes post-answer *sua sponte* dismissals, the State merely responds (at 11) that it is not "important" because there is no justification for distinguishing between pre- and post-answer dismissals. The reason courts have drawn this distinction, however, is that the text of Rule 4 authorizes only pre-answer dismissals. See Pet. 11-12, 21-22. Moreover, the State's merits argument about justification does not lessen the need for this Court to resolve the circuit split on that question.

3. The 7-5 decision by the en banc Third Circuit in *Bendolph*, which issued after Day's petition was filed, confirms the importance of the two recurring questions presented by the petition. *Bendolph* addressed AEDPA's similar limitations period for motions by federal prisoners under 28 U.S.C. § 2255.

As to the first question presented, the court reaffirmed its holding in *Robinson*, 313 F.3d at 134, 137, that "a limitations defense may be waived by a State defendant in a habeas proceeding" if it is not raised in the answer or "at the earliest practicable moment thereafter." See *Bendolph*, 409 F.3d at 160, 164. Regarding the second question, it conceded that the *sua sponte* dismissal provision of Habeas Rule 4 does not apply after an answer has been filed. *Id.* at 157. Nevertheless, the court held that the "spectrum of interests" underlying AEDPA's statute of limitations grants courts a discretionary post-answer power to dismiss untimely petitions *sua sponte*. *Id.* at 165, 167. It concluded that this power exists even when the limitations defense has been waived, *id.* at 166-67, but

that courts may not apply the defense *sua sponte* if the petitioner would be prejudiced. *Id.* at 161, 168-69.

These positions, which are quite different from the ones taken by the Eleventh Circuit below, deepen the conflict and confusion over the questions presented here. In the Eleventh Circuit, a State cannot waive the limitations defense and Habeas Rule 4 allows courts to dismiss untimely petitions *sua sponte* even after an answer is filed, regardless of prejudice. In the Third Circuit, a State can waive the defense and Rule 4 does not apply post-answer, but the policies behind AEDPA give courts a hazily defined power of post-answer dismissal that takes prejudice into account. The Sixth and Ninth Circuits agree with the Third that a State can waive the defense, but they hold that courts have no power to cure that waiver through a post-answer *sua sponte* dismissal. See p. 2 nn. 1-2, *supra*. The State's brief only adds to this confusion by advocating the Third Circuit approach instead of defending the positions taken by the Eleventh Circuit below.

These fundamental disagreements in the lower courts regarding the nature and waivability of AEDPA's limitations defense are "likely to create vast disparities concerning the treatment of government waiver between judges and from one case to the next." *Bendolph*, 409 F.3d at 175 n.27 (Nygaard, J., dissenting). This Court should step in to resolve the confusion by deciding "whether, or just when, a habeas court *may* consider a [limitations defense] that the State at some point has waived, or failed to raise." *Trest*, 522 U.S. at 90.

We note that a petition for certiorari has been filed in *Bendolph* (No. 05-3). While *Bendolph* addressed a motion by a federal prisoner under 28 U.S.C. § 2255, this case and all the others that make up the splits discussed above involve habeas petitions by state prisoners under § 2254. Because the federalism and comity concerns that the Eleventh Circuit and the State invoke to support *sua sponte* dismissal are unique to the § 2254 context, a decision in *Bendolph* would not neces-

sarily resolve this case or the splits. Therefore, regardless of how the Court rules on the *Bendolph* petition, it should grant certiorari in this case.

B. The decision below is erroneous.

The State devotes most of its brief to arguments on the merits. Tellingly, however, the State makes virtually no attempt to defend or rely on the reasoning of the court of appeals whose judgment it seeks to sustain. Instead, it contends that Day seeks a windfall and relies heavily on *Bendolph* and two recent decisions of this Court to support its position. None of the State's arguments withstands scrutiny.

1. Attempting to bolster the practical appeal of its position, the State contends that Day would receive a "windfall" if this Court finds a waiver of the limitations defense. Opp. 2, 15. This argument misunderstands the nature of an affirmative defense in our adversary system.

As explained in the petition, courts agree that AEDPA's statute of limitations is an affirmative defense that the State bears the burden of asserting, not an unwaivable bar to jurisdiction. Pet. 18; Pet. App. 4a; Professors' *Amicus* Br. 9-10. One purpose of affirmative defenses is to conserve judicial resources by relying on the *parties* to raise them early in the proceedings, which the State did not do here.[4] "Rescuing the [State] from its folly or inadvertence by permitting a district court to raise the statute of limitations after the parties have begun to address the merits of the petition subverts that purpose, and may even have the opposite effect." *Bendolph*, 409 F.3d at 173 (Nygaard, J., dissenting).

Moreover, as this Court recently held, "the potentially burdensome, time-consuming, and fact-intensive task of

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[4] Instead, the State filed a 30-page answer exhaustively addressing the merits of Day's claims several months before the district court dismissed the petition *sua sponte* based on limitations. Dkt. No. 7.

making case-specific investigation and calculation of whether the AEDPA limitations period has already run" is a task "normally and properly performed by trained counsel." *Pliler* v. *Ford*, 124 S. Ct. 2441, 2446 (2004). Having courts perform that task *sua sponte* "would undermine district judges' role as impartial decisionmakers." *Id.*

Another reason parties are required to raise affirmative defenses is that "the determination of what may be useful for the [litigant] can properly and effectively be made only by an advocate." *Dennis* v. *United States*, 384 U.S. 855, 875 (1966). There are many reasons that a State might choose not to invoke a limitations defense (see NACDL *Amicus* Br. 16-17), and it would undermine values of comity and federalism for a court to subvert such a choice by acting *sua sponte*. Thus, a ruling that affirmative defenses are waived if not raised is not a "windfall"; it is an acknowledgment that a party—not the court—is in the best position to know when its interests are at stake. Pet. 23.

2. The State next seeks refuge in *Bendolph*, asserting that because Day never contended his petition was timely, he was not prejudiced by the district court's *sua sponte* decision to apply the limitations bar. Opp. 2, 10 n.5, 17. As shown in the petition, this assertion is demonstrably wrong. In his response to the magistrate judge's order to show cause, Day argued that his petition was timely because the statutory tolling period included the time for seeking certiorari on state post-conviction review. Pet. 7 (citing Dkt. No. 13). Although both the magistrate judge and the Eleventh Circuit disagreed with this argument (Pet. App. 3a, 12a), Sixth Circuit precedent endorses it. Pet. 19-20.

Under the Sixth Circuit's rule, Day's petition was timely and the State's express concession of timeliness should have been given binding effect. *Id.* Instead, the district court prejudiced Day by *sua sponte* invoking an inapplicable defense the State correctly did not raise, thereby forcing him to

sit in prison while pursuing appeals on the limitations issue instead of proceeding with the merits of his significant claims for habeas relief. In light of this prejudice, the district court's dismissal was erroneous under *Bendolph*. See pp. 5-6, *supra*.

3. Finally, the State argues (at 2, 9, 15-16) that concerns of "federalism, comity and finality" underlying AEDPA trump the Civil Rules' principle that failure to assert a limitations defense in a responsive pleading results in waiver. The State begins (at 5-6) by quibbling about the degree to which habeas cases are civil in nature, but that is beside the point. As this Court recently confirmed, the Civil Rules apply in habeas cases "to the extent that they are *not inconsistent with* any statutory provisions or [the Habeas] [R]ules." Habeas Rule 11 (emphasis added); *see Gonzalez* v. *Crosby*, 125 S. Ct. 2641, 2646 (2005).

Under this test, the Civil Rules apply here. The State admits (and *Bendolph* confirms) that Habeas Rule 4 authorizes only pre-answer *sua sponte* dismissals. Opp. 15; *Bendolph*, 409 F.3d at 157. Thus, Rule 4 is not inconsistent with the Civil Rules' principle of post-answer waiver.

As to statutes, the State identifies no "statutory provisio[n]" of AEDPA that would be contravened if courts lacked the power to cure a State's waiver by raising limitations *sua sponte* after an answer has been filed. Nor has any court identified such a provision. The statute of limitations itself merely establishes the one-year time period and how it is calculated; nothing in it alters the ordinary procedures governing waiver and *sua sponte* consideration of limitations defenses in civil cases. See 28 U.S.C. § 2244(d); Professors' *Amicus* Br. 9-10, 14-16; cf. 28 U.S.C. § 2254(b)(3) (requiring express waiver of exhaustion defense).

Instead, the State and some courts contend that certain policy concerns underlying the AEDPA statute of limitations are inconsistent with the Civil Rules. Opp. 15; *Bendolph*, 409 F.3d at 165, 167; Pet. App. 5a. Because policy concerns are

not "statutory provisions," however, they cannot override the Civil Rules.[5] Habeas Rule 11; cf. *Gonzalez*, 125 S. Ct. at 2647-48 (considering whether substantive standards and procedural requirements in text of AEDPA were inconsistent with Civil Rule 60(b)). Moreover, if background AEDPA principles such as comity, finality, and federalism actually did prohibit courts from applying the Civil Rules to curtail the reach of the statute of limitations, this Court would not have acknowledged in *Mayle* that Civil "Rule 15(c)(2) relaxes * * * the [AEDPA] statute of limitations." 125 S. Ct. at 2572. Nor would it have held in *Gonzalez* that AEDPA did not restrict a Rule 60(b) motion concerning limitations filed more than a year after the petitioner's habeas proceedings concluded and more than four years after the limitations period expired. 125 S. Ct. at 2645, 2650.

CONCLUSION

For these reasons, the Eleventh Circuit erred by rejecting the Civil Rules regarding waiver and affirming the *sua sponte* dismissal of Day's petition as untimely. The petition for a writ of certiorari should be granted.

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[5] Even if policy concerns were relevant, the State fails to mention significant policies in favor of holding that AEDPA's statute of limitations on habeas petitions can be waived and that courts should not cure that waiver *sua sponte*. In addition to the policies discussed in Part B.1. above, this Court has held that "the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen* v. *Johnston*, 306 U.S. 19, 26 (1939). "Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar* v. *Thomas*, 517 U.S. 314, 324 (1996). For these reasons as well as others, *sua sponte* rulings are disfavored in the habeas context. Pet. 22; Professors' *Amicus* Br. 13.

Respectfully submitted.

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No. 04-1324

In the Supreme Court of the United States

PATRICK A. DAY,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF CERTAIN PROFESSORS OF LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Professors John H. Blume, Associate Professor of Law and Director of the Cornell Death Penalty Project, Cornell Law School; James S. Liebman, Simon H. Rifkin Professor of Law, Columbia University; and Randy Hertz, Professor of Clinical Law and Director of the Clinical and Advocacy Programs, New York University School of Law, respectfully move for leave to file the attached brief as *Amici Curiae* in support of Petitioner, Patrick Day. On March 30, 2005, a petition for a writ of certiorari was filed in *Day v. Crosby*. The consent of counsel for Petitioner has been obtained and is being filed with the Clerk by mail. The consent of counsel for Respondent was requested but refused.

Amici submit that it may be useful for this Court to consider their perspective on the issues raised by this case and therefore request permission to file the attached brief. *Amici* are law school professors who teach courses, conduct research, and publish articles and books on various topics related to federal habeas corpus, practice and procedure, and criminal justice.

Amici submit that this Court's review is warranted because of the importance of the issue presented by the case at bar: Whether, in a habeas corpus case, a court can raise the affirmative defense of the statute of limitations *sua sponte* after the state has filed an answer, especially where the state expressly concedes that the petition was timely. As set out in the attached *amici* brief, the importance of this issue is reflected not only by the clear circuit split, but also by the fact that this Court routinely grants review to resolve disagreements involving the statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (1996). For these reasons, *Amici* respectfully ask the Court to grant this motion and to permit the filing of the accompanying brief.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are law school professors John H. Blume, Associate Professor of Law and Director of the Cornell Death Penalty Project, Cornell Law School; James S. Liebman, Simon H. Rifkin Professor of Law, Columbia University; and Randy Hertz, Professor of Clinical Law and Director of the Clinical and Advocacy Programs, New York University School of Law. *Amici* teach courses, conduct research, and publish articles and books on various topics related to federal habeas corpus, practice and procedure, and criminal justice.[2] Since 1996, Professor Blume also has served as Counsel for the Habeas Assistance and Training Project, which consults with the Defender Services Committee of the Judicial Conference of the United States. Professor Liebman and Professor Hertz have co-authored the leading American

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[1] Pursuant to Rule 37.6, *Amici* certify that no counsel for a party authored this brief in whole or in part. This brief was written by undersigned counsel. No person or entity other than *Amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

[2] *See, e.g.*, John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. Rev. 271 (1996); John H. Blume & Stephen P. Garvey, *Harmless Error in Federal Habeas Corpus After* Brecht v. Abrahamson, 35 Wm. & Mary L. Rev. 163 (1993); John H. Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465 (1999); Randy Hertz & Martin Guggenheim, *Reflections on Judges, Juries and Justice: Ensuring the Fairness of Juvenile Delinquency Trials, in Symposium on Juvenile Justice Reform*, 33 Wake Forest L. Rev. 553 (1998); James Liebman, *A Rough Outline of the New Habeas and the New Section 2255* and *The New Habeas: The Standard for Adjudicating Legal Questions*, ALI-ABA Video L. Rev. (Sept. 12, 1996).

treatise on federal habeas corpus,[3] as well as a variety of other publications and studies on the death penalty.[4]

Amici file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

SUMMARY OF ARGUMENT

Amici submit this brief in support of Patrick Day's petition for a writ of certiorari. On November 29, 2004, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's decision that Mr. Day's petition for a writ of habeas corpus was untimely under 28 U.S.C. § 2244(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (1996) ("AEDPA"). Although the state's answer to the habeas petition expressly conceded that the petition was timely filed, the district court nonetheless *sua sponte* raised the statute of limitations issue and dismissed the petition. In affirming, the Eleventh Circuit held that "[a] concession of timeliness by the state that is patently erroneous does not compromise the authority of a district court *sua sponte* to dismiss a habeas petition as untimely, under AEDPA." *Day v. Crosby*, 391 F.3d 1192, 1195 (11th Cir. 2004). The Eleventh Circuit further held that the failure to plead an affirmative defense in a habeas case does not constitute a waiver as it does in other civil cases. *Id.* at 1194.

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[3] *Federal Habeas Corpus Practice and Procedure* (Vols. 1 and 2) (all eds. (1st-4th) and all supps. (1989-2002)).

[4] *See, e.g.*, Randy Hertz & James S. Liebman, Brecht v. Abrahamson: *Harmful Error in Habeas Corpus Law*, 84 J. Crim. L. & Criminology 1109 (1994); James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (2000); James Liebman et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases and What Can Be Done About It* (Feb. 11, 2002); Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Cal. L. Rev. 317 (1981).

Mr. Day now seeks certiorari to resolve a split in the circuits regarding whether, in a habeas corpus case, a court can raise the affirmative defense of statute of limitations *sua sponte* after the state has filed an answer, especially where the state expressly concedes that the petition was timely. The importance of this issue is reflected not only by the clear circuit split,[5] but also by the fact that this Court routinely grants review to resolve disagreements involving AEDPA's statute of limitations.[6] *Amici* submit that certiorari should be granted in this case. Under the Federal Rules of Civil Procedure, the statute of limitations is an affirmative defense that is waived by the defending party if not asserted in a timely manner. Moreover, in civil cases, it is improper in most instances for a court to raise the affirmative defense of statute of limitations *sua sponte*. Rules of statutory construction support application of these principles to

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[5] *Compare Day*, 391 F.3d at 1195 (district court can raise AEDPA statute of limitations *sua sponte* after state's concession of timeliness); *Jackson v. Sec'y for the Dep't of Corr.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (district court can raise AEDPA statute of limitations *sua sponte*), *with Nardi v. Stewart*, 354 F.3d 1134, 1141 (9th Cir. 2004) (state waives its statute of limitations defense by filing a responsive pleading that fails to affirmatively set forth the defense); *Robinson v. Johnson*, 313 F.3d 128, 137 (3d Cir. 2002) (opinion on panel rehearing) (affirmative defenses such as statute of limitations "under the AEDPA should be treated the same as affirmative defenses in other contexts, and, if not pleaded in the answer, they must be raised at the earliest practicable moment thereafter" or be deemed waived), *cert. denied*, 540 U.S. 826 (2003); *Scott v. Collins*, 286 F.3d 923, 928 (6th Cir. 2002) (state's failure to raise issue of timeliness resulted in waiver of requirement under AEDPA that petition be filed within reasonable time after effective date of AEDPA).

[6] *See, e.g., Felix v. Mayle*, 379 F.3d 612 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 824 (2005) (whether amendment of petition relates back to date of filing original petition); *Dodd v. United States*, 365 F.3d 1273 (11th Cir.), *cert. granted*, 125 S. Ct. 607 (2004) (when limitations period under 28 U.S.C. § 2255 begins to run); *Pace v. Vaughn*, No. 02-3049, 2003 WL 21754982 (3d Cir. July 30, 2003), *cert. granted sub nom. Pace v. DiGuglielmo*, 125 S. Ct. 26 (2004) (whether untimely state post-conviction petition may be "properly filed" under § 2244(d)(2)).

AEDPA. If Congress had intended to protect against waiver of the limitations defense under AEDPA, it could have explicitly so stated - as it did with respect to exhaustion.

Furthermore, contrary to the ruling below, Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Rule 4") does not authorize a departure from the manner in which a court treats the statute of limitations defense under the Federal Rules of Civil Procedure. Thus, after the court has required the state to answer the petition, the court no longer has the authority to dismiss *sua sponte*.

ARGUMENT

I. UNDER THE FEDERAL RULES OF CIVIL PROCEDURE, A PARTY WAIVES A STATUTE OF LIMITATIONS DEFENSE BY FAILING TO PLEAD IT AND A COURT ERRS BY RAISING THE DEFENSE *SUA SPONTE*

Under Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure, a party responding to a claim must assert all affirmative defenses in its responsive pleading. Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* § 5.20 (1985) (defendant must plead affirmative defense in answer so that plaintiff is aware of the allegations and has an opportunity to prepare to meet them). Like all the defenses enumerated in Fed. R. Civ. P. 8(c), the statute of limitations defense is a non-jurisdictional affirmative defense. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *O'Neel v. Nat'l Ass'n of Sec. Dealers, Inc.*, 667 F.2d 804, 807 (1982) ("We specifically renounce the contention that the defense of the statute of limitations goes to jurisdiction of the tribunal . . . ."). Generally, an affirmative defense that is not raised in the responsive pleading is waived. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278, at 644 (3d ed. 2004) ("It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case . . . .").

These principles are a critical component of the adversary system, which requires the parties to a dispute, not the courts, to frame the issues to be litigated. *See United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").[7] These principles are particularly applicable to statutes of limitations, which protect the defending party against stale claims and promote finality of cases in certain circumstances. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (statutes of limitations provide protection from stale claims).[8] Thus, the burden is properly placed on the defending party to assert a statute of limitations defense. *Id.* (statutes of limitations "put the adversary on notice to defend within a specified period of time"). Indeed, it is well settled under Fed. R. Civ. P. 8(c) that a statute of limitations defense is generally waived if it is not asserted in the responsive pleading. *See, e.g., Kropelnicki v. Siegel*, 290 F.3d 118, 130 n.7 (2d Cir. 2002) ("The statute of limitations is an affirmative defense that is waived if not

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[7] *See also Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125, 1130 (7th Cir. 2003) (Cudahy, J., concurring in part and dissenting in part) ("Under ordinary principles of the adversary system, we do not reach out to decide questions not before us."), *cert. denied*, 124 S. Ct. 2176 (2004).

[8] *See also McGraw v. Matthaei*, 388 F. Supp. 84, 88-89 (E.D. Mich. 1972) (untimely raising of statute of limitations not allowed when extensive trial preparation and discovery had already taken place).

raised."); *Day v. Liberty Nat'l Life Ins. Co.*, 122 F.3d 1012, 1015 (11th Cir. 1997) ("The statute of limitations is an affirmative defense which must be specifically pled .... [F]ailure to plead the bar of the statute of limitations constitutes a waiver of the defense.").[9]

Given these principles, a court should not correct a party's failure to plead an affirmative defense, such as the statute of limitations, by raising it *sua sponte*. Otherwise, there is no waiver at all. *See Smith v. Horn*, 120 F.3d 400, 409 (3d Cir. 1997) (raising affirmative defense *sua sponte* puts court in "untenable position of ferreting out possible defenses upon which the state has never sought to rely" and makes judges come "dangerously close to acting as advocates for the state rather than as impartial magistrates"); *Haskell v. Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988) ("Since [the statute of limitations] is a waivable defense, it ordinarily is error for a district court to raise the issue *sua sponte*. Otherwise, the waiver aspect of Rule 8(c) would have little meaning." (citations omitted)).[10] *Amici* submit that the Court should grant certiorari to resolve the application of these well-settled principles to cases arising under AEDPA.

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[9] *See also Haskell v. Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988) (failure to raise limitations defense in first responsive pleading constitutes waiver).

[10] *See also Hutcherson v. Lauderdale County, Tenn.*, 326 F.3d 747, 757 (6th Cir. 2003) ("Courts generally lack the ability to raise an affirmative defense sua sponte."); *Kropelnicki*, 290 F.3d at 130 n.7 ("[W]e have held that 'a district court "ordinarily" should not raise a statute of limitations defense *sua sponte*.'" (citation omitted)); *Hardiman v. Reynolds*, 971 F.2d 500, 502 (10th Cir. 1992) ("Generally, where the parties have not raised a defense, the court should not address the defense sua sponte.").

II. THE PRINCIPLES GOVERNING CONSIDERATION OF A LIMITATIONS DEFENSE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE APPLY TO HABEAS CORPUS CASES

Rule 81(a)(2) of the Federal Rules of Civil Procedure states:

> These rules are applicable to proceedings for ... habeas corpus ... to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

Similarly, Rule 11 of the Habeas Rules provides that "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." This Court has confirmed that habeas cases are civil proceedings generally governed by the Federal Rules of Civil Procedure. Indeed, just last Term in *Banks v. Dretke*, 540 U.S. 668, 704-05 (2004), this Court held that Fed. R. Civ. P. 15(b) applies in habeas cases. *See also Browder v. Director, Dep't of Corr.*, 434 U.S. 257, 269 (1978) (habeas is civil proceeding governed by Federal Rules of Civil Procedure). Lower courts concur. *See, e.g., Farmer v. Litscher*, 303 F.3d 840, 842-43 (7th Cir. 2002) (common understanding that habeas corpus cases are civil rather than criminal proceedings); *United States ex rel. Gaugler v. Brierley*, 477 F.2d 516, 523 (3d Cir. 1973) ("[F]ederal habeas corpus proceedings are *civil*, and not criminal, in nature. They are governed by the Federal Rules of Civil Procedure." (footnote omitted)). This Court has also recognized the importance of addressing the application of specific provisions of the Federal Rules of Civil

Procedure to habeas cases, ruling on or granting certiorari in a number of such cases.[11]

AEDPA contains a one-year statute of limitations.[12] Under the above provisions, the Federal Rules of Civil Procedure governing consideration of affirmative defenses such as limitations remain applicable in habeas corpus cases. As set forth below, four significant considerations lend support to this conclusion. First, given that AEDPA's statute of limitations is a departure from the common law, it should be read narrowly as an ordinary, waivable affirmative defense - not broadly as an unwaivable bar. In addition, the well-settled principle that an affirmative defense not raised is waived was not preempted by AEDPA's statute of limitations, nor does the statutory construction of AEDPA reveal any congressional intent to do so. Finally, Rule 4 does not provide any support for a court's *sua sponte* dismissal of a petition after a responsive pleading has already been ordered by that court.

[11] *See, e.g., Banks v. Dretke*, 540 U.S. 668 (2004) (Fed. R. Civ. P. 15(b) applies in habeas cases); *Felix v. Mayle*, 379 F.3d 612 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 824 (2005) (Fed. R. Civ. P. 15(c)'s application to habeas); *Thompson v. Bell*, 373 F.3d 688 (6th Cir. 2004), *cert. granted in part*, 125 S. Ct. 823 (2005) (application of Fed. R. App. P. 10(e) to habeas cases); *Gonzalez v. Sec'y for the Dep't of Corr.*, 366 F.3d 1253 (11th Cir. 2004), *cert. granted in part*, 73 U.S.L.W. 3410 (U.S. Jan. 14, 2005) (No. 04-6432) (Fed. R. Civ. P. 60(b)'s application to habeas). The application of Fed. R. Civ. P. 8(c) and its governing principles to habeas cases is of similar importance, particularly given the generally dispositive nature of statute of limitations defenses.

[12] AEDPA actually contains two different one-year statute of limitations provisions, one for persons in state custody (28 U.S.C. § 2244(d)(1)) and one for persons in federal custody (28 U.S.C. § 2255). The former provision is at issue here.

A. The Statute Of Limitations In AEDPA Must Be Read Narrowly Because It Is A Departure From Common Law

At common law, there was no statute of limitations applicable to habeas claims, a principle that was recognized by this Court. *United States v. Smith*, 331 U.S. 469, 475 (1947) ("*[H]abeas corpus* provides a remedy . . . without limit of time."); *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) ("Congress has yet to create a statute of limitations for federal habeas corpus actions.").[13] In 1996, however, AEDPA established for the first time a one-year statute of limitations for habeas petitions. *See Brown v. Angelone*, 150 F.3d 370, 371 (4th Cir. 1998). In the congressional debate over AEDPA's statute of limitations provision, Representative Pelosi noted the drastic impact of this significant departure from the common law: "For the first time, a use it or lose it approach is being applied to a basic constitutional right. Constitutional rights are not time-bound, they are timeless or they are worthless." 142 Cong. Rec. H3614 (daily ed. Apr. 18, 1996). Moreover, unlike other provisions of AEDPA, such as the successive-petition and evidentiary hearing provisions,[14] which were enacted after development of a consistent body of common law on the topic, the statute of limitations on habeas corpus petitions was a pure legislative creation - orphaned from any common law supporting a time limitation for habeas.

But that was as far as Congress went. As discussed in section II.C *infra*, there is no language in

[13] Although Rule 9(a) of the Habeas Rules had permitted a district court to dismiss a petition under certain circumstances if the state proved prejudice by delay in filing the petition, this Court found that a prisoner's six-year delay in filing a habeas petition did not violate Rule 9(a). *See Lonchar v. Thomas*, 517 U.S. 314, 326-28 (1996).

[14] 28 U.S.C. § 2244(b)(3)(A) and § 2254(e)(2), respectively.

AEDPA indicating that Congress also sought to depart from the common law rules treating the statute of limitations as a waivable, affirmative defense. As such, AEDPA's statute of limitations must be interpreted narrowly. *See* Norman J. Singer, *Statutes and Statutory Construction* § 50.01, at 140 (6th ed. rev. 2000) ("Absent an indication that the legislature intends a statute to supplant common law, the courts should not give it that effect." (footnote omitted)).

As this Court has recognized since 1879: "No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw v. R.R. Co.*, 101 U.S. 557, 565 (1879). This Court has emphasized that "[i]t is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.'" *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983) (citations omitted) (alterations in original).[15] Thus, an expansive interpretation of the AEDPA statute of limitations as an unwaivable defense simply is not warranted.

The importance of the writ of habeas corpus also counsels in favor of interpreting the statute of limitations narrowly. The right of habeas corpus, as a facet of American law, is as old as our Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or

[15] *See, e.g., Fleet Nat'l Bank v. Valente (In re Valente)*, 360 F.3d 256, 261 (1st Cir. 2004) ("[T]o find broad preemption in the UFTA, in the absence of language of preemption, would be at odds with the presumption that statutes should not be construed to alter common law principles absent an explicit statement of legislative intent to do so.").

Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. The right to petition for a writ of habeas corpus has been a federal statutory right for nearly as long. *See* Judiciary Act of 1789, ch. 20 § 14, 1 Stat. 81 (1845); 28 U.S.C. § 2254(a). Because of the significance of the writ, this Court has recognized the importance of allowing a defendant the opportunity for one round of federal review: "Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869) (the writ "has been for centuries esteemed the best and only sufficient defence of personal freedom")).

B. AEDPA Does Not Preempt Application Of Federal Rule Of Civil Procedure 8(c) And Its Principles To Habeas Corpus Cases

Nothing in AEDPA suggests that Congress intended to depart from the common law rule by creating an unwaivable statute of limitations bar. The lower courts are in agreement that AEDPA's statutory limitations period is an affirmative defense. *See Nardi v. Stewart*, 354 F.3d 1134, 1140 (9th Cir. 2004) ("There is no dispute that AEDPA's statute of limitations is an affirmative defense."); *Jackson v. Sec'y for the Dep't of Corr.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (same).[16] Neither AEDPA nor its legislative history addresses assertion and waiver of the defense, nor are there any provisions suggesting a different standard from that applicable to Fed. R. Civ. P. 8(c). Thus, in a habeas case, just as in an

[16] *See also Scott v. Collins*, 286 F.3d at 927 (same); *Carrington v. Robinson*, No. 99-CV-76377-DT, 2001 WL 558232, at *4 (E.D. Mich. Mar. 27, 2001) (same); *Acosta v. Artuz*, 221 F.3d 117, 121-22 (2d Cir. 2000) (same); *Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) (same).

ordinary civil case, a responding party must assert a statute of limitations defense in its responsive pleading, and failure to do so results in a waiver. *See Nardi*, 354 F.3d at 1141 (state must raise statute of limitations defense in order to avoid waiver); *Robinson v. Johnson*, 313 F.3d 128, 137 (3d Cir. 2002) (affirmative defenses under AEDPA should be treated the same as in other civil cases), *cert. denied*, 540 U.S. 826 (2003); *Scott v. Collins*, 286 F.3d 923, 927-30 (6th Cir. 2002) (failure to plead statute of limitations defense in habeas case results in waiver).[17] As explained in *Pino v. United States*, No. 98 Civ. 0092(RCC), 2004 WL 1320888 (S.D.N.Y. June 14, 2004), "'[p]arties are generally required to assert affirmative defenses early in litigation, so they may be relied upon, prejudice may be avoided, and judicial resources may be conserved. Habeas proceedings are no exception.'" *Id.* at *2 (quoting *Robinson*, 313 F.3d at 134); *see, e.g., Green v. United States*, 260 F.3d 78, 85 (2d Cir. 2001) ("the government expressly waive[d] its [AEDPA] statute of limitations defense by advocating a remand and 'suggesting' the conditions for that remand").

In *Robinson*, the Third Circuit explained why AEDPA's statute of limitations is waivable: "[B]ecause the AEDPA limitations period is subject to equitable modifications such as tolling, it is also subject to other non-jurisdictional, equitable considerations, such as waiver." 313 F.3d at 134. The court went on to explain that "affirmative defenses under the AEDPA should be

[17] *See also Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (implying that government waiver is possible in finding that government did not waive its AEDPA statute of limitations defense); *Saucier v. Warden, N.H. State Prison*, 215 F.3d 1312 (table), No. 99-1345, 2000 WL 739713, at **1 (1st Cir. June 5, 2000) (unpublished) (same); *Samuel v. Duncan*, 92 F.3d 1194 (table), No. 95-56380, 1996 WL 413632, at **1 (9th Cir. July 22, 1996) (unpublished) (AEDPA statute of limitations defense can be waived); *Andrews v. Johnson*, 976 F. Supp. 527, 530 (N.D. Tex. 1997) (since statute of limitations in habeas is affirmative defense, it is waived if not pled).

treated the same as affirmative defenses in other contexts, and, if not pleaded in the answer, they must be raised at the earliest practicable moment thereafter." *Id.* at 137. In so holding, the court reviewed several cases and concluded that the purpose of requiring parties to raise affirmative defenses early on was "not only to avoid prejudice, but also to promote judicial economy." *Id.*; *see also Grant v. Preferred Research, Inc.*, 885 F.2d 795, 797 (11th Cir. 1989) ("The Supreme Court has held that the purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it."); *Davis v. Bryan*, 810 F.2d 42, 44 (2d Cir. 1987) ("The statute of limitations is an affirmative defense under Fed. R. Civ. P. 8(c) that must be asserted in a party's responsive pleading 'at the earliest possible moment' and is a personal defense that is waived if not promptly pleaded." (citations omitted)). Therefore, AEDPA's statute of limitations, like any other affirmative defense, must be pled in the answer or at the earliest practicable moment thereafter. Otherwise, it is waived.

Furthermore, nothing in AEDPA overrides the corollary principle applied in civil cases that courts should not revive waived statute of limitations defenses by raising them *sua sponte*. Indeed, this Court has made clear that *sua sponte* rulings in habeas cases are disfavored. *See, e.g., Castro v. United States*, 540 U.S. 375, 377 (2003) (court may not recharacterize a motion for habeas relief without notifying the petitioner of its intent); *Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (court of appeals may not recall mandate *sua sponte* unless it is to correct "a miscarriage of justice"). In this case, *sua sponte* dismissal on limitations grounds is particularly inappropriate given that the state not only failed to assert a statute of limitations defense, but affirmatively conceded the timeliness of the habeas petition. *See Scott v. Johnson*, 227 F.3d 260, 262-63 (5th Cir. 2000) (state's intentional waiver of procedural defense

serves as a consideration against *sua sponte* invocation of procedural bar).

C. The Statutory Construction Of AEDPA Supports Application Of Federal Rule Of Civil Procedure Principles To AEDPA Statute Of Limitations

If Congress intended to protect the state from waiving the statute of limitations defense in habeas cases, it would have expressly said so. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."). In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991), this Court, interpreting Congress' intent with respect to the Age Discrimination in Employment Act of 1967 ("ADEA"), stated: "'[I]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history'" (quoting *Mitsubishi*, 473 U.S. at 628) (alterations in original). Here, because neither the plain language of AEDPA nor its legislative history suggests an intent to protect against waiver of the statute of limitations, Congress is presumed not to have intended to provide such protection. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) ("Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so. . . . The absence of this language in 28 U.S.C. § 1603(b) instructs us that Congress did not intend to disregard structural ownership rules."); *United States v. Naftalin*, 441 U.S. 768, 773 (1979) ("The short answer is that Congress did not write the statute that way.").

Moreover, in another section of the statute, Congress expressly protected the state against inadvertent waiver of another affirmative defense, exhaustion of state remedies. Section 2254(b)(3) provides that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, *expressly waives* the requirement." 28 U.S.C. § 2254(b)(3) (emphasis added). Thus, Congress clearly knew how to expressly alter the general rules of waiver to protect the state, and even did so with respect to another procedural defense in habeas cases. Under basic rules of statutory construction, Congress' explicit protection of the state from inadvertent waiver of the exhaustion requirement and its failure to similarly protect the state from waiver of the statute of limitations defense indicates that Congress did not intend to provide such protection. *See* Norman J. Singer, *Statutes and Statutory Construction* § 47.25, at 327 (6th ed. rev. 2000) ("There is generally an inference that omissions are intentional. This rule is based on logic and common sense. It expresses the concept that when people say one thing they do not mean something else." (footnotes omitted)); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))); *accord Bates v. United States*, 522 U.S. 23, 29-30 (1997) (same).

There are many examples where this Court and lower courts have applied this negative inference in refusing to read language into a statute that is not provided explicitly. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452-53 (2002) ("Where Congress wanted to provide for successor liability in the Coal Act, it did so explicitly, as demonstrated by other sections in the Act

that give the option of attaching liability to 'successors' and 'successors in interest.'"); *Lindh v. Murphy*, 521 U.S. 320, 330 (1997) ("The insertion of § 107(c) with its different treatments of the two chapters thus illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted."); *Welzel v. Advocate Realty Invs., LLC (In re Welzel)*, 275 F.3d 1308, 1314 (11th Cir. 2001) (Congress' use of word "reasonable" with respect to one set of items but not another indicates that Congress acted purposefully in deciding whether to include or exclude reasonableness standard); *Henderson v. Immigration & Naturalization Serv.*, 157 F.3d 106, 129-30 (2d Cir. 1998) ("Congress' use of explicitly retroactive language in that part of the bill [AEDPA § 413(g)], and its failure to employ any analogous language in the nearby and closely related § 440(d), by itself strongly indicates that Congress did not intend § 440(d) to apply retroactively."). Thus, the statutory construction of AEDPA supports application of Fed. R. Civ. P. 8(c) and its principles to AEDPA's statute of limitations.

D. Rule 4 Does Not Authorize A Court To Dismiss A Habeas Petition *Sua Sponte* After A Responsive Pleading Has Been Filed

The court of appeals based its conclusion that the statute of limitations was unwaivable on Rule 4, holding that a court may dismiss a petition *sua sponte* even after an answer has been filed. *Day*, 391 F.3d at 1194-95. Rule 4 provides in relevant part:

> If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court,

> the judge must dismiss the petition . . . . *If the petition is not dismissed*, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.[18]

Rule 4 (emphasis added). The most logical reading of Rule 4 is that a court may dismiss *sua sponte* a facially deficient habeas petition brought under § 2254 *prior* to a responsive pleading being filed, but not after. The language of Rule 4 is sequential and expressly allows a court to dismiss *sua sponte* a habeas petition prior to ordering a responsive pleading. There is nothing in the Rule, however, that authorizes a court to dismiss *sua sponte* after the court has ordered the responsive pleading. To read absent words into the Rule "would result 'not [in] a construction'" of the Rule, "'but, in effect, an enlargement of it by the court.'" *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004) (citation omitted). Thus, under the rules of statutory construction discussed above, Rule 4 should be interpreted as allowing only that which it expressly authorizes. *See United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897) (legislative intent is found in the legislature's chosen language; "[n]o mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute"); *see also Lamie*, 540 U.S. at 534 (when a statute's language is plain, it is the court's duty to "'enforce it

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[18] *Amici* cite to the current version of the Rule, which was amended effective December 1, 2004. Notably, Congress could have amended Rule 4 in order to clarify any intent to give district courts a continuing power to dismiss *sua sponte*. *See Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. . . . This [approach] allows both of our branches to adhere to our respected, and respective, constitutional roles.").

according to its terms'" (citations omitted)); *Lewis v. Barnhart*, 285 F.3d 1329, 1331-32 (11th Cir. 2002) ("'"[W]here the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said."'" (citations omitted)).[19]

The Advisory Committee Notes to Rule 4 support this interpretation, explaining that a district court is granted the initial power to dismiss *sua sponte* a facially deficient petition to "screen out frivolous petitions and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." *See* Rule 4 advisory committee's note (citing *Allen v. Perini*, 424 F.2d 134, 141 (1970)). Thus, the court fulfills the purpose of Rule 4 by dismissing any frivolous or facially invalid petitions prior to ordering a responsive pleading. Allowing *sua sponte* dismissals after an answer has been filed would undermine the very purpose of burdening a respondent with the filing of an answer.[20]

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[19]. Nor is the language in Rule 4 allowing the court to "take other action the judge may order" intended to grant district courts the power to dismiss *sua sponte* after an answer. Rather, this provision is "designed to afford the judge flexibility in a case where *either dismissal or an order to answer may be inappropriate.*" Rule 4 advisory committee's note (emphasis added). The Advisory Committee Notes make clear that "other action[s]" are those that "may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition," or those actions that might clarify or narrow a petition *prior* to an answer being filed. *Id.*

[20] Certain circuit courts have adopted this interpretation of Rule 4 and AEDPA's statute of limitations provision, holding that the statute of limitations is an affirmative defense that is waived in a habeas case if it is not raised in the first responsive pleading, and that Rule 4 does not allow a court to cure the waiver *sua sponte* after the responsive pleading has been filed. *Nardi*, 354 F.3d at 1140, 1141-42; *Scott v. Collins*, 286 F.3d at 927, 930.

CONCLUSION

For all of the reasons set forth above, *Amici* respectfully request that the Court grant Mr. Day's petition for a writ of certiorari.

Respectfully submitted,

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No. 04-1324

IN THE

Supreme Court of the United States

PATRICK A. DAY,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*; and BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Amicus curiae the National Association of Criminal Defense Lawyers ("NACDL") respectfully requests leave of this Court to file the following brief in the above captioned matter. In support of its motion, NACDL states as follows:

1. The petitioner granted its consent in writing. Petitioner's written consent is being filed simultaneously with this Brief and Motion. Respondent refused his consent.

2. The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states.

Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving federal habeas corpus. NACDL files approximately 35 *amicus curiae* briefs each year on various issues in this Court and other courts. NACDL has filed *amicus curiae* briefs in this Court in many cases involving federal habeas corpus, including cases raising issues similar to the one presented here. See, *e.g.*, *Pliler* v. *Ford*, 124 S. Ct. 2441 (2004); *Slack* v. *McDaniel*, 529 U.S. 473 (2000); *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998).

The statute of limitations of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and rules governing pleading, waiver, and the *sua sponte* dismissal power of the federal district courts under the Federal Rules Governing Section 2254 Cases affect vast numbers of habeas corpus petitions filed in the federal courts, and thus directly implicate the interests of NACDL's members and their clients. This Court should grant this motion to allow NACDL to participate as *amicus curiae*.

Respectfully submitted,

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QUESTIONS PRESENTED

Does the State waive the one-year limitations period of 28 U.S.C. § 2244(d) by failing to plead it in an answer or otherwise raise it in a federal district court?

Does a federal district court have the power under Rule 4 of the Federal Rules Governing Section 2254 Cases to dismiss a habeas petition *sua sponte* on grounds of untimeliness after it has ordered a response from the State and the State has conceded timeliness?

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") incorporates by reference the statement of interest in its foregoing motion for leave to file a brief as *amicus curiae*.

[1] Petitioner has consented in writing to the filing of this brief, and its letter of consent has been filed with the Court. Respondent has refused consent to the filing of this brief. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

In a decision that expressly "part[s] with the Sixth and Ninth Circuits," Pet. App. 6a, the United States Court of Appeals for the Eleventh Circuit upheld the power of a federal district court to dismiss *sua sponte* a petition for habeas corpus as untimely under the AEDPA statute of limitations, even though the State had filed an answer in which it did not plead the statute of limitations and indeed had conceded the timeliness of the petition. *Id.* According to the Eleventh Circuit, Rule 4 of the Federal Rules Governing Section 2254 Cases ("Habeas Rules") "'differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses,'" and justified the district court in *sua sponte* dismissing the habeas petition in this case as untimely after a show-cause hearing. *Id.* at 5a.

NACDL fully agrees with the exposition in the petition for certiorari of the circuit conflicts, of the error of the Eleventh Circuit's ruling, and the importance of this Court's review. This brief does not repeat petitioner's analysis, but instead treats in more depth a fundamental reason why it is imperative that this Court grant review and resolve the conflict in the circuits: namely, the flat irreconcilability of the ruling below with the plain language, structure, and purpose of the Habeas Rules. There is simply no foundation for the remarkable ruling of the Eleventh Circuit that the Habeas Rules adopted by this Court dispense with the traditional adversarial process and enjoin federal district courts *sua sponte* to invoke affirmative defenses on behalf of the State that the State itself does not assert.

REASONS WHY THE PETITION SHOULD BE GRANTED

This Court's review is justified by virtue of the acknowledged, deep, and mature conflict among the courts of appeals and the importance of the questions presented. Pet. 10-20. But this Court's intervention is especially vital because the decision below runs roughshod over the express limitations on the district court's powers in Habeas Rule 4. Rule 4 permits *sua sponte* dismissals only *prior* to the ordering of an answer by the district court; only if the prisoner is not "entitled" to relief, which forecloses district court determination of any waivable defense; and only if the lack of entitlement is "plainly" apparent from the "face" of the petition and annexed exhibits, which categorically forecloses determination of any affirmative defenses (like limitations defenses) that cannot be determined strictly from reliance on the petition or annexed court records. Because the time limits of of AEDPA, 28 U.S.C. § 2244(d)(1)(A), are not jurisdictional, any affirmative defense based on the statute must be asserted in the State's answer or else it is waived.

I. THE DECISION BELOW CONTRAVENES THE PLAIN LANGUAGE OF RULE 4.

A. Habeas Rule 4 Confers on a District Court the Authority to Dismiss A Petition *Sua Sponte* Only Before the State Files a Response.

Habeas Rule 4 confers upon the federal district court a limited power to dismiss facially invalid petitions only *prior* to the effective commencement of adversarial proceedings with the State. That authority expires when adversarial proceedings begin – indeed, with any required *service* of the petition upon the State.

The Habeas Rules must be understood as a unitary whole providing for an orderly sequence of events. Rule 1 defines the applicability of the Habeas Rules. Rule 2 defines the persons eligible to petition for relief and the requisite form and content of a petition. Rule 3 then provides that the original and two copies of the petition should be filed with the clerk of the district court, who, having ascertained that the petition meets the requirements of Rules 2 and 3, "shall file the petition and enter it on the docket." Habeas R. 3. The habeas petitioner is not obliged to serve the petition upon the respondent contemporaneously with filing, and "[t]he filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court." *Id.* Indeed, Rule 4 makes plain that service of the petition upon the respondent occurs only after preliminary consideration of the petition by a district judge. Rule 4 provides:

Rule 4. Preliminary Consideration by Judge

> The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general ....

Habeas R. 4;[2] see also *id.* adv. cmt note (noting that rule of mandatory service of petition regardless of whether an answer is ordered departs from prior practice, where "the respondent often d[id] not receive a copy of the petition unless the court directs an answer under 28 U.S.C. § 2243").

Rule 4 thus authorizes the district courts to conduct a "preliminary" (*i.e.*, pre-service) screening of habeas petitions and then to dismiss summarily any facially invalid petition prior to service. As the Advisory Committee stated, Rule 4 reflects the pre-existing duty under 28 U.S.C. § 2243 "to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer. *Allen* v. *Perini*, 424 F.2d 134, 141 (6th Cir. 1970)." Habeas R. 4 adv. comm. note.

It is impossible to torture from the language of Rule 4, as the Eleventh Circuit did, an inquisitorial power of the district court that continues even after the filing of the State's answer, much less a power to *sua sponte* adjudicate affirmative defenses of the State that the State has not asserted (and has even disavowed). To the contrary, Rule 4 expressly declares that the power to order summary dismissals exists only *before* the district court orders an answer or other pleading.

> If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal.... *Otherwise* the judge shall order the respondent to file an answer ....

---

2 The quoted language of the Rule is from the version in force at the time of the lower courts' decisions. The rule was amended effective December 1, 2004. According to the Advisory Committee notes, no substantive change was intended regarding the quoted portion of the rule.

Habeas Rule 4 (emphasis added). "Otherwise" is used disjunctively here: a court may *either* make an order for dismissal *or* order an answer. Once an answer is ordered, no further capacity to dismiss the petition apart from the respondent's motion is contemplated, as the Advisory Committee Notes to Habeas Rule 4 confirm:

> If it plainly appears from the face of the petition and any exhibits attached thereto that the petitioner is not entitled to relief in the district court, the judge must enter an order summarily dismissing the petition and cause the petitioner to be notified. *If summary dismissal is not ordered, the judge must order the respondent to file an answer or to otherwise plead to the petition* within a time period to be fixed in the order.

Id. Thus, under Rule 4, the examination stage ends and the pleading stage begins once the judge determines that the face of the petition and any exhibits do not "plainly appear" to show that the petitioner is not entitled to relief, and therefore summary dismissal is inappropriate.

The sequential structure of the Habeas Rules underscores the self-evident meaning of Rule 4. Once an answer is ordered and the petition is served pursuant to Rule 4, Rule 5 defines the content of the answer; Rule 6 and Rule 7 govern discovery and expansion of the record; and Rule 8 governs evidentiary hearings. Contrary to the Eleventh Circuit's holding, the summary dismissal power that is specific to the preliminary examination of the petition in Rule 4 simply does not authorize the magistrate judge's *sua sponte* show-cause proceeding and dismissal order more than a year after the State filed its answer.

According to a plain text of the Habeas Rules, the right to dismiss the petition *sua sponte* comes *before* the respondent is ordered to make an answer and not after. As the Sixth Circuit has stated:

> Significantly, Rule 4 does not give a court continuing power to dismiss *sua sponte* the case after the court orders respondent to file an answer. In short, Rule 4 gives a district court the ability to dismiss habeas petitions *sua sponte*, but that ability expires when the judge orders a respondent to file an answer or take other appropriate action."

Scott v. *Collins*, 286 F.3d 923, 930 (6th Cir. 2002).

Indeed, the Eleventh Circuit stands alone on this issue. No other court of appeals, even among those that permit *sua sponte* dismissals based on affirmative defenses, has permitted such dismissals after the State has filed an answer that does not raise the defense. See, *e.g.*,, *Kiser* v. *Johnson*, 163 F.3d 326, 328 (5th Cir. 1999); *Nardi* v. *Stewart*, 354 F.3d 1134, 1141 (9th Cir. 2004) ("We now conclude that the district court lacks the authority to *sua sponte* dismiss a habeas petition as time-barred after the state files an answer which fails to raise the statute of limitations defense."); *Herbst* v. *Cook*, 260 F.3d 1039, 1042 & n. 3 (9th Cir. 2001) (district court has authority to raise the statute of limitations *sua sponte* before the state ever files a response); *Hill* v. *Braxton*, 277 F.3d 701, 707 (4th Cir. 2002) ("Our point is simply that when a federal habeas court, in its discretion, raises an affirmative defense before the state has even entered a responsive pleading, as the district court did here, it acts consistently with Rule 4."); *Acosta* v. *Artuz*, 221 F.3d 117, 123 (2d Cir. 2000) (the Habeas Rules "give the district court the power to review and dismiss habeas petitions prior to any responsive pleading by the state"). This Court should vindicate the plain language of Rule 4 and reverse the Eleventh Circuit's aberrant ruling.

B. District Courts Lack The Power To Apply Limitations Defenses Under Rule 4 Because Determinations That Relief Is Foreclosed Cannot Be Made From The Face Of The Petition.

Even if the summary dismissal power of Rule 4 could be invoked after the filing of the State's answer, Rule 4 by its plain terms would still forbid invocation of that power to dismiss the petition *sua sponte* for untimeliness under AEDPA.

The Eleventh Circuit (like other courts that permit *sua sponte* dismissals on this ground) has simply disregarded the requirement of Rule 4 that dismissal may only be ordered "[i]f it plainly appears *from the face of the petition and any exhibits annexed to it* that the petitioner *is not entitled* to relief in the district court." Habeas R. 4 (emphasis added). It is possible that the petition and exhibits on their face may indicate both the date of filing and "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," 28 U.S.C. § 2244(d)(1)(A), and thus allow the district court to determine whether more than one year had elapsed between those two dates. But even if these dates can be ascertained, a district court can *never* conclude from the "face" of the petition and attached exhibits that a petitioner "is not entitled to relief in the district court" because of the statute of limitations, for three independent reasons.

First, the limitations period of section 2244(d)(1)(A) only applies if the date when direct review of the conviction concluded or became unavailable is later than three other dates specified in subsections (d)(1)(B) to (D). The applicability of at least one of those subsections – subsection (d)(1)(B), which sets the commencement date of the limitations period as "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the

applicant was prevented from filing," *id.* § 2244(d)(1)(B) – was not in this case, and never will be ascertainable from the face of the petition. A district court would always have to issue an order to show cause why subsection (d)(1)(A) should not apply, because that is the only way to make sure that there was no unlawful impediment to earlier filing created by state action that would trigger the application of (d)(1)(B). However, Rule 4 does not authorize show-cause orders; instead, it only authorizes sua sponte dismissal based on the face of the petition. If a district court must issue a show-cause in order to ascertain whether facts exist that might prevent dismissal of the action, then by definition it is not determining the petitioner's entitlement to relief solely from "from the face of the petition and any exhibits annexed to it." Accordingly, the district court (or a magistrate judge acting in its stead) will always exceed its authority under Rule 4 because show-cause orders are necessary before dismissal can be ordered. Rule 4 simply cannot be read to grant district courts a power of summary dismissal for statute of limitations violations.

Second, and relatedly, a district court can never determine from the face of the petition that a plaintiff is not entitled to relief by virtue of subsection (d)(1) because the limitation period therein is always *potentially* subject to tolling (a) under the equitable tolling doctrine, *Steed* v. *Head*, 219 F.3d 1298, 1300 (11th Cir. 2000); (b) by agreement of the petitioner and the state; or (c) by operation of the statutory tolling provision of subsection (d)(2). Once again, a district court cannot hold a petition time-barred without giving the parties by show-cause order an opportunity to be heard as to whether there are reasons the limitations period may not apply, such as tolling. It matters not that, in the show-cause proceeding here, the district court rejected petitioner's equitable tolling defense, and that the other two sources of tolling did not apply. See Pet. App. 7a, 13a-14a. The point is that the possibility of tolling can never be excluded simply

from the face of the petition, and always necessitates a show-cause proceeding to give the parties an opportunity to be heard. Any such hearing (such as the one conducted by the magistrate judge here) is unauthorized by Rule 4. Rule 4 simply does not permit *sua sponte* determinations of statute of limitations questions.

Third, even if the foregoing hurdles could be overcome, a district court can only conclude that the petitioner "is not entitled to relief" within the meaning of Rule 4 if application of the statute of limitations in section 2244(d)(1) is mandatory (*i.e.*, is not waiveable). As discussed in the following section, there is simply no basis in AEDPA or the federal rules for holding a statute of limitations defense nonwaiveable.

II. THE WAIVER RULES THAT APPLY TO AFFIRMATIVE DEFENSES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD APPLY TO THE AEDPA STATUTE OF LIMITATIONS.

As an initial matter, a filing period that is not waiveable is effectively jurisdictional. Congress knows how to create a mandatory jurisdictional filing period, such as the requirement that petitions for certiorari to this Court in civil cases shall be filed within 90 days of entry of judgment. See 28 U.S.C. § 2101(c). In AEDPA, however, Congress chose to enact "[a] 1-year period of limitation" in section 2244(d)(1). When Congress uses a term of art, such as "period of limitiation," it is presumed to intend that specific meaning. See *Jones* v. *R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836, 1845 (2004) Section 2244(d)(1) is a statute of limitations, and there is no dispute (even by the Eleventh Circuit) that this statute, like any other statute of limitations, 'grants an affirmative defense. Pet. App. 4a; *Nardi*, 354 F.3d at 1140 ("There is no dispute that AEDPA's statute of limitations is an affirmative defense."); *Hill*, 277 F.3d at 705 ("We

conclude that the one-year limitation period contained in § 2244(d) is an affirmative defense that the state bears the burden of asserting."); *Davis* v. *Johnson*, 158 F.3d 806, 810 (5th Cir. 1998); *Acosta*, 221 F.3d at 122 ("The AEDPA statute of limitation is ... an affirmative defense ...."); *Jackson* v. *Secretary for Dep't of Corrs.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (per curiam) ("the statute of limitations is an affirmative defense").

Because the Habeas Rules do not address affirmative defenses directly, AEDPA's limitations defense is governed by the Federal Rules of Civil Procedure. Habeas Rule 11 states: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." As the Fifth Ciruit has stated, "[w]hen [the Habeas Rules] are otherwise silent, Rule 11 compels us to follow the Federal Rules of Civil Procedure in disposing of habeas corpus petitions." *McDonnell* v. *Estelle*, 666 F.2d 246, 249 (5th Cir. 1982); see also *Kiser*, 163 F.3d at 328-29. There is overwhelming support across the federal courts for applying the Federal Rules of Civil Procedure to matters of procedure not directly addressed by the Habeas Rules. See *Banks* v. *Dretke*, 540 U.S. 668, 687 (2004) (applying Rule 15(b) amendments to habeas pleadings); *Whitaker* v. *Meachum*, 123 F.3d 714, 715-16 & n.2 (2d Cir. 1997) (per curiam) (applying FRCP motions for summary judgment to habeas context); *Bleitner* v. *Welborn*, 15 F.3d 652, 654 (7th Cir. 1994) (judge has FRCP rule 6(b)(2) discretion to extend motion-filing deadlines in habeas cases); *Walker* v. *True*, 399 F.3d 315, 319 & n.1 (4th Cir. 2005) (applying motion to dismiss in habeas context); *Allen* v. *Calderon*, No. 02-16917, 2005 WL 271222, at *2 (9th Cir. Feb. 3, 2005) (applying appointment of guardian ad litem under FRCP Rule 17(c) to habeas context); *Williams* v. *Clarke*, 82 F.3d 270, 272-73 (8th Cir. 1996) (applying Rule 41(a)(1) voluntary dismissal to

habeas context despite concerns of prisoners using it as a stalling tactic).

Under the Federal Rules of Civil Procedure, statutes of limitations are waiveable. Rules 8(c) and 12(b) require that parties raise affirmative defenses in their first responsive pleadings. Fed. R. Civ. P. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively ... statute of limitations ... and any other matter constituting an affirmative defense."); *id.* 12(b) ("[e]very defense ... shall be asserted in the responsive pleading," except certain specified defenses (not including statute of limitations) that may be raised by motion). The consequence of not pleading the statute of limitations is the waiver of that affirmative defense. A limitations defense "is generally waived unless it is raised in the defendant's responsive pleading." *Expertise, Inc.* v. *Aetna Fin. Co.*, 810 F.2d 968, 973 (10th Cir. 1987); see also 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278, at 477 (2d ed. 1990) ("Generally, a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case."); *EEOC* v. *White & Son Enters.*, 881 F.2d 1006, 1009 (11th Cir. 1989) ("'[t]he hornbook law is that affirmative defenses must be specifically pled'.... [t]he court did not abuse its discretion in ruling that appellant had waived its affirmative defenses" by not pleading them before pre-trial); *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("a statute of limitations[] is subject to waiver" if not timely raised).

The same rule has traditionally applied in the habeas context. Hence, in filing an answer under Habeas Rule 5, the State is obliged to plead the limitations defense or else it is waived. See *Day* v. *Liberty Nat'l Life Ins. Co.*, 122 F.3d 1012, 1015 (11th Cir. 1997) (per curiam) ("The statute of limitations is an affirmative defense which must be specifically pled. This court has held in a number of discrimination actions that failure to plead the bar of the statute of limitations constitutes a waiver of the defense.")

(citation omitted); *Scott*, 286 F.3d at 928 ("[T]he statute of limitations in §2244(d) is an affirmative defense that must be pleaded to avoid waiver."); *United States ex rel. Galvan* v. *Gilmore*, 997 F. Supp. 1019, 1026 (N.D. Ill. 1998) ("since § 2244(d) does not affect this court's subject matter jurisdiction over habeas petitions, the state can waive the § 2244(d) timeliness issue by failing to raise it") (citations omitted); *Robinson* v. *Johnson*, 313 F.3d 128, 134-137 (3d Cir. 2002) (sur panel reh'g) (holding that a state can waive the statute of limitations under the AEDPA "if not pleaded in the answer ... [or] raised at the earliest practicable moment thereafter"), *cert. denied*, 540 U.S. 826 (2003); *Nardi*, 354 F.3d at 1141 ("We agree with the Third and Sixth Circuits that the state waives its statute of limitations defense by filing a responsive pleading that fails to affirmatively set forth the defense.").

Nothing in AEDPA alters the ordinary rule that a statute of limitations affirmative defense is deemed waived if not pleaded. Indeed, AEDPA strongly supports the contrary inference that the limitations defense of section 2244(d)(1) is waiveable. For a separate defense of failure to exhaust state remedies, Congress expressly provided that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). Had Congress wished to require the express waiver of the limitations defense, or otherwise limit ordinary application of waiver doctrine, it could easily have included a similar provision for limitations defenses in this or another section. It did not do so. Moreover, Congress's prohibition in section 2254 of implied waiver of exhaustion requirements indicates that Congress accepted the general principle that other affirmative defenses could be impliedly waived. The ruling below permitting *sua sponte* dismissal of habeas petitions on statute of limitations grounds, even when the State has failed to raise the defense in its answer,

effectively abrogates the waiver doctrine. That ruling has no warrant in the Habeas Rules or AEDPA.

In summary, the ruling below is irreconcilable with the plain language of Habeas Rule 4. The summary *sua sponte* power granted there exists only prior to the ordering of an answer or other responsive pleading, and statute of limitations defenses can never be the basis of a summary dismissal because it is impossible to determine from the face of the petition and annexed exhibits whether the petitioner is entitled to no relief by virtue of such a defense.

III. THE ELEVENTH CIRCUIT'S RULING THAT DISTRICT COURTS SHALL *SUA SPONTE* APPLY AFFIRMATIVE DEFENSES NOT RAISED BY THE STATE IS CONTRARY TO THE ADVERSARIAL SYSTEM OF JUSTICE.

The Eleventh Circuit has developed a passing strange theory that a district court is charged not only with the conventional task of determinining the facial validity of the claims stated in the petition (which Rule 4 does require), but also with conceiving and applying affirmative defenses that the State has not asserted. Any such notion is inimical to the adversarial process. "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring); *Hardiman* v. *Reynolds*, 971 F.2d 500, 502 (10th Cir.1992); *Acosta*, 221 F.3d at 122.

Assigning the district court the function of conceiving and applying affirmative defenses that the State does not assert compromises the status of the federal judge as neutral decisionmaker. It would be particularly strange to thrust a federal judge into that unfamiliar role in the special context of

habeas corpus litigation, which is intended to be solicitous of the interests of the habeas petitioner:

> There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.

Harris v. *Nelson*, 394 U.S. 286, 292 (1969).

Moreover, the fairness found in the adversarial court system is an essential part of proper proceedings in our legal system. "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland* v. *Washington*, 466 U.S. 668, 696 (1984); see also *Republican Party* v. *White*, 536 U.S. 765, 801 (2002) (Stevens, J., dissenting) ("it is the ability ... to reevaluate [legal theories] in the light of an adversarial presentation, and to apply the governing rule of law even when inconsistent with those views, that characterize judicial openmindedness."); M. Hale, *History and Analysis of the Common Law of England* 258 (1713) (the adversarial process "beats and bolts out the Truth much better").

AEDPA suffers not in the least if the district courts are denied these extraordinary powers; the ability to avoid unneeded evidentiary hearings in federal habeas cases is well preserved by the court's initial ability to dismiss a habeas petition during its examination stage. As the Sixth Circuit maintained, "the interests [of comity, finality, and federalism] are well preserved in light of a district court's continued ability to dismiss *sua sponte* a habeas petition as an initial matter." *Scott*, 286 F.3d at 930 n.10.

This Court has elsewhere criticized *sua sponte* dismissals, including in the habeas context, based on the notion that the most efficient way to resolve disputes is through briefing and argument by both parties. See *Trest* v. *Cain*, 522 U.S. 87, 92 (1997). Indeed, *sua sponte* dismissals to cure waiver harm the adversarial process by undermining the accountability of the State for its own defenses. "A district court's ability to dismiss a habeas petition *sua sponte* as an initial matter ... does not amount to a power to cure *sua sponte* a party's waiver of an affirmative defense." *Scott*, 286 F.3d at 930; see also *Haskell* v. *Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988) ("Since [the statute of limitations] is a waivable defense, it ordinarily is error for a district court to raise the issue *sua sponte*. Otherwise, the waiver aspect of Rule 8(c) would have little meaning.") (citations omitted); *Esslinger* v. *Davis*, 44 F.3d 1515, 1527 (11th Cir. 1995) (reversing a *sua sponte* dismissal of a habeas petition after the state had waived an affirmative defense because "[t]he court's *sua sponte* invocation of the procedural default to bar relief, despite the State's waiver, served no important federal interest"). The adversarial system of justice demands that the State be the master of its defenses and and bear the consequences of its failure to plead all affirmative defenses.

Finally, while commonly a State's failure to assert a limitations defense will be inadvertent, there may also be situations in which a State consciously decides to forbear from asserting the defense. A State may weigh the competing interests of finality of convictions against its obligations of fairness to its citizens and integrity of criminal proceeding. For example, if there is severe police or prosecutorial misconduct, a flagrant violation of constitutional rights, or a high probability that the petitioner is innocent, the State may in the interest of justice decline to assert an available limitations defense. Or the State for strategic reasons may decide that it would not wish to have a court rule on contested

limitations issues in a particular case. The Eleventh Circuit's ruling, despite cloaking its holding in the mantle of federalism, strips the State of its prerogative to determine which defenses to assert, in favor of a wooden mandatory command that the district court "shall make an order for ... summary dismissal" whenever it determines that a statute of limitations defense may lie. Nothing in AEDPA, the Habeas Rules, or principles of federalism and comity compels this result.

Accordingly, even if the plain text of Habeas Rule 4 were ambiguous (which it is not), there is reason to authorize a district court to dismiss a habeas petition *sua sponte* for procedural reasons once the pleading stage had begun. Indeed, the policies inherent in the adversarial habeas system compel the opposite result, and should have prevented the court below from dismissing Day's petition.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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Dated: April 11, 2004

(13)

Supreme Court, U.S.
FILED
NOV 3 1 2005
OFFICE OF THE CLERK

No. 04-1324

In the Supreme Court of the United States

PATRICK A. DAY,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 30, 2005
CERTIORARI GRANTED SEPTEMBER 27, 2005

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Opinion of the United States Court of Appeals for the Eleventh Circuit, dated November 29, 2004 ..... 1a

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IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT, IN AND FOR
ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CRIMINAL DIVISION
CASE NO. 97-4411

PATRICK DAY,

Defendant.

RELEVANT DOCKET ENTRIES

10/08/97	4	Affidavit for: Murder 2nd Degree, Ret. 10-24-97. Original arrest date for 2nd degree murder was 10/3/97. Date offense occurred: 02271996.
04/07/98	50	Indictment filed.
04/09/98	55	Initial appearance for: Homicide 1st Degree.
08/31/98	133	Jury trial began, but not concluded.
09/03/98	164	Found guilty: Ct. 1, 2nd degree murder (LIO)
10/14/98	193	Defendant sentenced on upward departure due to conduct and measures taken after commission of crime to cover up victims death, and defendants prior convictions.
10/14/98	199	Judgment and sentence filed.

11/02/98	210	Notice of appeal filed.
01/07/00	232	Filed mandate & opinion from district court affirming the judgment and sentence of this court.
03/13/01	238	Motion for post conviction relief filed pro se.
02/26/02	244	Judge: Geeker, Filed order denying defendant's motion for post conviction relief.
02/28/02	247	Motion for post conviction relief filed – amended – pro se and memorandum of law in support of amended motion for post conviction relief.
03/14/02	250	Judge: Geeker, Filed order denying defendant's second motion for post conviction relief.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

PATRICK A. DAY,

Appellant,

v.

CASE NO. 1998-4141
CASE NO. 1D02-1271

STATE OF FLORIDA,

Appellee.

RELEVANT DOCKET ENTRIES FOR NO. 1998-4141*

11/09/98	Notice of Appeal Filed
05/03/99	Initial Brief on Merits
06/28/99	Appellee's Answer Brief
07/23/99	Appellant's Reply Brief
12/21/99	Affirmed - Authored Opinion (746 So.2d 1219)
01/06/00	Circuit Court Mandate

* This case number was assigned to Day's direct appeal of his sentence.

RELEVANT DOCKET ENTRIES FOR NO. 1D02-1271**

04/01/02	Notice of Appeal Filed
04/04/02	Initial Brief on Merits (filed by Patrick Day)
04/10/02	Notice that state will not file answer brief
10/09/02	Affirmed – Per Curiam Affirmed
10/22/02	Motion for Rehearing (filed by Patrick Day)
11/15/02	Deny Appellant's Motion for Rehearing – 56A
12/03/02	Circuit Court Mandate

** This case number was assigned to Day's appeal of the order denying his motion for post conviction relief.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PATRICK A. DAY,
Petitioner,

v. 3:03cv15/MCR/MD

JAMES V. CROSBY, JR.,
Respondent.

RELEVANT DOCKET ENTRIES

01/13/03	1	PETITION for writ of habeas corpus under 28 U.S.C. 2254 (Entered: 01/14/2003)
01/14/03		CASE REFERRED to Magistrate Judge M Casey Rodgers (Entered: 01/14/2003)
02/04/03	4	ORDER by Magistrate Judge M Casey Rodgers. The clerk shall send copies of this order and the petition to the respondent and the Atty General for the State of FL who shall have 45 days to show cause why the relief requested should not be granted. (sic) setting answer deadline for 3/21/03 for MICHAEL MOORE. (Entered: 02/04/2003)
03/19/03	7	ANSWER to Complaint by respondent MICHAEL MOORE (Attorney: CHARLES RICHEY MCCOY) modified on 3/10/2004

03/21/03	8	ORDER by Magistrate Judge M Casey Rodgers. Petitioner has 20 days to file a reply to the resps answer. Setting response to order deadline Re: to file reply to answer for 4/10/03 for PATRICK DAY (Entered: 03/21/2003)
04/03/03	9	RESPONSE by petitioner PATRICK DAY re: [7-1] answer by MICHAEL MOORE (Entered: 04/04/2003)
06/06/03	10	ORDER by Judge Roger Vinson Referring Case to Magistrate Judge Miles Davis (Entered: 06/09/2003)
12/11/03	11	ORDER TO SHOW CAUSE – Within 20 days of docketing this order, petitioner shall show cause why his federal habeas petition should not be dismissed as untimely. Show Cause Response due by 1/4/2004. Signed by Judge MILES DAVIS on December 11, 2003. (Entered: 12/15/2003)
12/11/03	12	ORDER REASSIGNING CASE. Case reassigned to Judge M CASEY RODGERS for all further proceedings pursuant to administrative order (4:95mc40111). Judge Lacey Collier no longer assigned to case. New judge initials (MCR) should replace LAC in case number on all future documents filed. Signed by Chief Judge ROGER VINSON on 12/11/03. (Entered: 12/16/2003)
12/30/03	13	RESPONSE re 11 Order to Show Cause, by PATRICK DAY. (Entered: 12/30/2003)

01/06/04	14	REPORT AND RECOMMENDATIONS re 1 Petition for Writ of Habeas Corpus – That the petition be DISMISSED and the clerk be directed to close the file. Objections to R&R due by 2/3/2004. Signed by Judge MILES DAVIS on January 6, 2004. (Entered: 01/07/2004)
01/16/04	15	OBJECTION to 14 Report and Recommendations by PATRICK DAY. (Entered: 01/21/2004)
01/21/04	16	ORDER ADOPTING REPORT AND RECOMMENDCATIONS – Re: 14 Report and Recommendations – The petition for writ of habeas corpus (doc. 1) challenging the conviction and sentence in State of Florida v. Patrick A. Day, in the Circuit Court of Escambia County, Florida, case no. 97-4411, is DISMISSED and the clerk is directed to close the file. Signed by Judge M CASEY RODGERS on January 21, 2004. (Entered: 01/22/2004)
02/12/04	17	NOTICE OF APPEAL entitled "Certificate of Appealability" (being construed as notice of appeal) as to 16 Order Adopting Report and Recommendations, by PATRICK DAY. (Certificate of Readiness due by 3/2/2004; Transcript Order Form due by 3/17/2004) (Entered: 02/17/2004)

02/12/04	18	MOTION for Certificate of Appealability (also construed as a notice of appeal, see doc. 17) by PATRICK DAY. (Entered: 02/17/2004)
02/18/04	20	ORDER - Denying 18 Motion for Certificate of Appealability. Signed by Judge M CASEY RODGERS. (Entered: 02/18/2004)
03/08/04	26	Letter/MOTION to Extend Time to file Motion To Appeal In Forma Pauperis by PATRICK DAY. (Entered: 03/10/2004)
03/11/04	28	ORDER – Granting 26 Motion to Extend Time. Petitioner shall submit a completed in forma pauperis application on or before 4/8/2004. Signed by Judge MILES DAVIS. (Entered: 03/12/2004)
03/29/04	32	MOTION for Leave to Appeal in forma pauperis by PATRICK DAY. (Entered: 03/29/2004)
04/02/04	34	ORDER denying 32 Motion for Leave to Appeal in forma pauperis. Signed by Judge M CASEY RODGERS. Petitioner shall pay the $225.00 filing fee within 30 days of the date of this order. (Entered: 04/02/2004)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-10778

PATRICK DAY,

Petitioner-Appellant,

versus

JAMES CROSBY,

Respondent-Appellee.

RELEVANT DOCKET ENTRIES

05/03/04	Motion to Proceed IFP: (ProSe)
05/03/04	Motion for Certificate of Appealability: (ProSe)
06/04/04	ORDER: Appellant's motion for certificate of Appealability is GRANTED. Appellant's motion for leave to proceed on appeal in forma pauperis is GRANTED. (CRW)
07/12/04	Appellant Brief Filed: (ProSe)
08/02/04	Appellee Brief Filed: (Atty: Charles R. McCoy)
08/13/04	Reply Brief Filed: (ProSe)
11/29/04	Judgment Entered
11/29/04	Opinion Issued
12/29/04	Mandate Issued

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT, IN AND FOR
ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CRIMINAL DIVISION
CASE NO. 97-4411

PATRICK DAY,

Defendant.

MOTION FOR POST CONVICTION RELIEF

The above named Defendant, pro se, pursuant to Florida Rules of Criminal Procedure 3.850, moves this Honorable Court to vacate, set-aside, or correct the judgment or sentence imposed in the above styled-cause, and would show the following:

1. Name and location that entered the judgment under attack: First Judicial Circuit Court, Pensacola, Escambia County, Florida

2. Date of judgment of conviction: September 3, 1998

3. Length of Sentence: Fifty-Five (55) Years DOC

4. Nature of offense(s) involved (all cases): Second Degree Murder with possession of a Weapon

5. What was your plea? (Check only one)

(a) Not Guilty XXXX
(b) Guilty _____
(c) Nolo Contendere _____
(d) Not Guilty by Reason of Insanity _____

* * * * *

6. Kind of trial: (check only one)

(a) Jury XXXX
(b) Judge only without Jury _____

* * * * *

8. Did you appeal from the judgment of conviction?
Yes XXXX No _____

9. If you did appeal, answer the following:

(a) Name of Court: First District Court of Appeals
(b) Results: Per Curiam Affirmed
(c) Date of Result: January 10, 2000
(d) Citation (If known):

10. Other than a Direct Appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc., with respect to this judgment or sentence in this Court?

Yes _____ No XXXX

* * * * *

12. Other than a Direct Appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc., with respect to this judgment in any other Court?

Yes _____ No XXXX

* * * * *

14. The following grounds are alleged for relief:

(Grounds omitted in printing)

* * * * *

16. Do you have any petition, application, appeal, motion, etc., now pending in any Court, either State or federal, as to the judgment under attack?

Yes ____ No XXXX

* * * * *

WHEREFORE, movant requests that the Court grant all relief that the movant may be entitled in this proceeding, including but not limited to (here list the nature of the relief sought):

1. Remand for Evidentiary Hearing for new trial

* * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion For Post Conviction Relief and Memorandum Of Law has been furnished to Curtis A. Golden State Attorney, M.C. Blanchard Judicial Building, P.O. Box 12726, Pensacola, FL 32575; Ernie Lee Magaha, Clerk of Court, 190 Governmental Center, Pensacola, FL 32501 by U.S. Mail this 9 day of March, 2001.

/s/ Patrick Day

DORM# 01-2050 MAIL# 1031
Gulf Correctional Institution-Annex
699 Ike Steele Road
Wewahitchka, Florida 32465

CERTIFICATE OF NOTARY

STATE OF FLORIDA
COUNTY OF GULF

SWORN AND SUBSCRIBED TO, before me the undersigned authority, this 9 day of March, 2001 personally appeared Patrick A. Day, who first being duly sworn and who produced his inmate identification card saying that he is the defendant, in the above-styled cause, that he has read the foregoing Post Conviction Motion and Memorandum, and has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these matters are true and correct.

NOTARY SEAL

/s/ Helen L. Carlsten
NOTARY SIGNATURE

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

PATRICK DAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IS FILED.

CASE NO. 1D02-1271

Opinion filed October 9, 2002.

An appeal from the Circuit Court for Escambia County.
Nickolas P. Geeker, Judge

Appellant pro se.

Robert A. Butterworth, Attorney General; Edward C. Hill, Jr., Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

MINER, KAHN and WEBSTER, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

November 15, 2002

CASE NO.: 1D02-1271
L.T. No.: 97-4411

Patrick Day	v.	State Of Florida
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion filed October 22, 2002, for rehearing is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Patrick Day

Edward C. Hill, Jr., A.A.G.

Hon. Richard E. Doran, A.G.

jm

/s/ Jon. S. Wheeler
JON S. WHEELER, CLERK

MANDATE

From

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable Judges of the Circuit Court for Escambia County

WHEREAS, in that certain cause filed in this Court styled:

PATRICK DAY Case No : 1D02-1271

v. Lower Tribunal Case No : 97-4411

STATE OF FLORIDA

The attached opinion was issued on October 9, 2002.

YOU ARE HEREBY COMMANDED that further proceedings, if required, be had in accordance with said opinion, the rules of Court, and the laws of the State of Florida.

WITNESS the Honorable MICHAEL E. ALLEN, Chief Judge of the District Court of Appeal of Florida, First District, and the Seal of said Court done at Tallahassee, Florida, on this 3rd day of December 2002.

/s/ Jon S. Wheeler
JON S. WHEELER, Clerk
District Court of Appeal of Florida,
First District

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PATRICK A. DAY,
Petitioner,

v. 3:03cv15/MCR/MD

JAMES V. CROSBY, JR.,
Respondent.

PROVIDED TO
GULF CI ON
JAN 08 2003
FOR MAILING

FORM FOR USE IN APPLICATIONS FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

NAME: Patrick Day

PRISON NUMBER: P03864

NAME OF PLACE OF CONFINEMENT:
Gulf Correctional Institution

ADDRESS OF PLACE OF CONFINEMENT:
500 Ike Steele Rd., Wewahitchka, FL 32465

* * * * *

PETITION

1. Name and location of court which entered the judgment of conviction under attack and state court case number(s): First Judicial Circuit, Escambia County, Florida

2. Date of judgment of conviction: September 3, 1998

3. Length of sentence: 55 years

* * * * *

9. Did you appeal from the judgment of the conviction? Yes (X) No ( )

10. If you did appeal, answer the following:

(a) Name of court First District Court of Appeal Tallahassee FL

(b) Result Affirmed Case No. 98-4141

(c) Date of result- Dec. 21 1999 / Informed Jan. 6 2000

* * * * *

11. Did you file any postconviction motions under either Florida Rule of Criminal Procedure 3.800 or 3.850 with the state trial court or any other postconviction motions or petitions for writ of habeas corpus with the state trial court or state appellate court to this judgment and conviction? Yes (X) No ( )

12. If you did file any matters within the realm of question 11, answer the following as to each motion or petition. Attach separate pages as needed for each motion or petition filed.

(a) The type of motion/petition filed Motion 3.850

(b) Date motion/petition filed March 9, 2001

(c) Name of court Escambia County Circuit Court

(d) Result Denied

(e) Date of result Feb. 26, 2002

13. If your motion or petition described in paragraph 12 was denied, did you file an appeal of that denial with the appropriate state appellate court? Yes (X) No ( )

As to each motion or petition (attach separate pages as needed) indicate:

(a) Name of court where appeal filed First District Court of Appeal, Tallahassee

(b) Date appeal filed March 29, 2002

(c) Result Per Curiam Affirmed

(d) Date of result Oct. 2, 2002
Motion for Rehearing Denied

14. State *concisely* every ground on which you claim you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

(Grounds omitted in printing)

15. Have you previously filed any petitions, applications, or motions with respect to your judgment and conviction in any federal court?
Yes ( ) No (X)

* * * * *

17. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No (X)

* * * * *

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

* * * * *

I declare that under penalty of perjury that the foregoing is true and correct.

Executed on 1/7/03
Date

/s/ Patrick Day
Signature

Signature of Attorney (If Any)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PATRICK A. DAY,
Petitioner,

v. 3:03cv15/LAC/MCR

JAMES V. CROSBY, JR.,[1]
Respondent.

ORDER

Petitioner has filed an application for writ of habeas corpus under 28 U.S.C. § 2254. (Doc. 1). The petition is in proper form, and the appropriate filing fee has been paid. Respondent should be given the opportunity to respond.

The response "shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding." Rule 5, Rules Governing Section 2254 Cases. If it is the State's contention that Petitioner's claims have not been exhausted in the state courts or that they are procedurally barred from review in the state courts, the response should set forth what state court remedies are appropriate with respect to each claim raised, and whether those remedies are still available to Petitioner. If these defenses are not raised in the response, they will be considered waived.

Accordingly, it is ORDERED:

---

[1] Since the filing of this action, James V. Crosby, Jr. has been appointed Secretary of Department of Corrections and therefore is substituted as the Respondent.

1. The clerk of this court is directed to furnish copies of the petition (to include any attachments to said petition) and this order to the Respondent and the Attorney General of the State of Florida, who shall have 45 days from the date this order is entered on the docket in which to show cause, if any, why the relief requested should not be granted.

DONE AND ORDERED this 4th day of February, 2003.

/s/ M. Casey Rodgers
M. CASEY RODGERS
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

(Title omitted in printing)

ANSWER TO PETITION FOR HABEAS CORPUS

Pursuant to the court's order of February 4, 2003, Respondent Crosby, Secretary of the Florida Department of Corrections,[2] answers Day's petition for habeas corpus. Respondent asserts that Day is in the lawful custody of the State of Florida, and his petition should be denied.

I. Procedural History

Trial Court Proceedings, Adjudication and Sentencing

Tried by jury for premeditated murder, Day was convicted for the lesser included offense of second degree murder. (Ex. A-3). He was sentenced to 55 years (Ex. B), an upward departure based on his "elaborate cover-up," and escalation from non-violent to violent crime. (Ex. C). He is still in custody.

Direct Appeal

Day took a direct appeal of right to the First District Court of Appeal (First DCA). He raised only one issue: essentially, whether his departure sentence was proper or the two reasons given by the trial court. (Ex. D, p.4; Ex. F, p.2). The State answered in kind. (Ex. E, p.6).

---

[2] After Day's habeas petition was filed, Michael Moore was succeeded as Secretary of the Fla. Dept. of Corrections by James V. Crosby, Jr. Mr. Crosby is being named pursuant to Fed.R.Civ.P. 25(d)(1) (automatic substitution of public officer who ceases to hold office).

The First DCA affirmed Day's sentence in a full opinion. (Ex. G). Day v. State, 746 So.2d 1220 (Fla. 1st DCA 1999). The mandate followed on January 6, 2000. (Ex. H). Day did not seek further review by the Florida or U.S. Supreme Court. (habeas pet., p.3).

Postconviction Relief

Day moved for postconviction relief under Fla.R.Crim.P. 3.850. (Ex. I). That motion raised five claims of ineffective trial counsel. (*Id.*, p.4-6).[3] It was summarily denied. (Ex. J., *with* attachments thereto). Day submitted an amended motion for postconviction relief raising a sixth claim of ineffectiveness. (Ex. K, p.170). As amended, the motion was again denied summarily. (Ex. L, *with* attachments thereto).

On appeal, Day submitted a handwritten brief to the First DCA. (Ex. M). The State, relying on specific provisions of Florida's appellate rules, declined to answer. (Ex. N). The First DCA affirmed, per curiam and without opinion. (Ex. O). Day v. State, 833 So.2d 122 (Fla. 1st DCS 2002) (table). The mandate issued on December 3, 2002. (Ex. P).

Day's habeas petition bears a prison-stamp indicating it was submitted to prison officials on January 8, 2003. Based on these events, Respondent agrees the petition is timely; filed after 352 days of untolled time.

II. Argument

(Argument omitted in printing)

III. Conclusion

Day's habeas petition should be denied.

---

[3] Cited pages are those stamped at the bottom center.

CERTIFICATE OF SERVICE

I certify a copy of this ANSWER TO PETITION FOR HABEAS CORPUS has been sent by U.S. mail to **PATRICK A. DAY**, *pro se*, DOC# P03864, Gulf Correctional Institution, 500 Ike Steele Road, Wewahitchka, Florida 32465; on March 17th, 2003.

Respectfully submitted,

CHARLIE CRIST
ATTORNEY GENERAL

/s/ Charlie McCoy
Charlie McCoy
Senior Asst. Attorney General
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(850) 922-6674 (fax)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PATRICK A. DAY,
Petitioner,

v. 3:03cv15/LAC/MD

JAMES V. CROSBY, JR.,
Respondent.

ORDER TO SHOW CAUSE

Before the court is a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 (doc. 1). Respondent filed an answer (doc. 7), to which petitioner responded (doc. 9). From a review of the record, it appears the petition is untimely. The court will therefore require petitioner to show cause why his petition should be not dismissed.[1]

BACKGROUND

In 1997, petitioner was charged with first-degree premeditated murder with a weapon in the Escambia County Circuit Court, case number 97-4411. (Doc. 7, Ex. A-3).[2] He was found guilty by jury verdict of second-degree murder, a lesser included offense. (*Id.*). On October 14, 1998, petitioner was adjudicated guilty of second-degree murder and sentenced to an upward departure sentence of 55 years incarceration. (Exs. B & C). On appeal of his conviction, petitioner challenged only his upward departure sentence

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[1] The district court has the discretion to raise *sua sponte* the timeliness of a state prisoner's habeas petition. *Jackson v. Secretary for the Dep't of Corrections*, 292 F.3d 1347, 1349 (11th Cir. 2002).

[2] Hereafter all references to exhibits will be to those attached to Doc. 7 unless otherwise noted.

(Ex. D). The Florida First District Court of Appeal ("First DCA") affirmed petitioner's sentence in a written opinion filed December 21, 1999. *Day v. State*, 746 So.2d 1219 (Fla. 1st DCA 1999) (Table) (copy at Ex. G).

PROCEDURAL HISTORY

On March 9, 2001 petitioner filed a motion for post-conviction relief pursuant to FLA.R.CRIM.P. 3.850, in which he raised five grounds of ineffective assistance of trial counsel. (Ex. I). The trial court denied the motion in a written order dated February 26, 2002 (Ex. J). That same day, petitioner signed (and filed) an amended motion for post-conviction relief pursuant to FLA.R.CRIM.P. 3.850, in which he raised the previous five grounds and one new ground of ineffective assistance. (Ex. K). The trial court construed the amended motion as a second motion under FLA.R.CRIM.P. 3.850 and, on March 13, 2002, denied relief on the merits (Ex. L, Order Denying Defendant's Second Motion For Post-conviction Relief). Petitioner filed a notice of appeal on March 15, 2002, in which he appealed "the denial of his Motion for Post Conviction relief rendered on February 26, 2002." (Ex. L, Notice of Appeal). The First DCA affirmed the denial order without written opinion on October 9, 2002. *Day v. State*, 833 So.2d 122 (Fla. 1st DCA 2002) (Table) (copy at Ex. O). The mandate issued on December 3, 2002. (Ex. P). Petitioner filed the instant federal habeas petition on January 8, 2002.[3] (Doc. 1).

DISCUSSION

Because Petitioner filed this § 2254 petition after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the AEDPA gov-

---

[3] Although petitioner signed his petition on January 7, 2003, (doc. 1, p. 17), the institutional stamp bearing petitioner's initials indicates that petitioner provided the petition to prison officials for mailing on January 8, 2003 (*id.*, p. 1).

erns the present petition. *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Pursuant to 28 U.S.C. § 2244, a one-year period of limitation applies to the filing of a federal habeas corpus petition by a person in custody pursuant to a state court judgment. The limitation period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

§ 2244(d)(1). According to the tolling provision of § 2244(d), the time during which a "properly filed" application for state postconviction or other collateral review is pending shall not be counted toward any period of limitation. 28 U.S.C. § 2244(d)(2).

In the instant case, petitioner has not asserted that a government-created impediment to his filing existed, that he bases his claim on a right newly recognized by the Supreme Court, or that the facts supporting his claim could not have been discovered through the exercise of due diligence before the filing of this petition. Thus, the statute of limitations must be measured from the remaining trigger, which is the date on

which his conviction became final. *See* 28 U.S.C. § 2244(d)(1).

The First DCA affirmed petitioner's conviction on December 21, 1999. Petitioner did not seek review of his conviction in the Florida Supreme Court or in the United States Supreme Court. Thus, the one-year limitations period began to run 90 days after the First DCA's decision issued.[4] *Bond v. Moore*, 309 F.3d 770 (11th Cir. 2002) (for purposes of § 2244(d)(1)(A), the one-year limitations period began to run when the time expired for filing a petition for certiorari with the United States Supreme Court); *Jackson v. Secretary for the Dep't of Corrections*, 292 F.3d 1347, 1349 (11th Cir. 2002); *accord Kaufman v. United States*, 282 F.3d 1336 (11th Cir. 2002) (applying same rule to motion filed under 28 U.S.C. § 2255). Accordingly, for purposes of § 2244 petitioner's conviction became final on March 20, 2000, and the § 2244 limitations period began to run.

Calculating the time period from March 20, 2000, 353 days elapsed before petitioner filed his first Rule 3.850 motion. This motion was pending from March 9, 2001 (the date it was filed) until December 3, 2002 (the date the First DCA issued the mandate on petitioner's appeal of the order denying relief).[5] The clock began to run once more on December 3, 2002, and expired 12 days later on December 16, 2002.[6]

---

[4] The 90-day period for filing in the United States Supreme Court a petition for a writ of certiorari seeking review of a decision of a state appellate court runs from the date of the state court's opinion, no the date of issuance of the mandate. *See* SUP. CT. R. 13.3

[5] *See Nyland v. Moore*, 216 F.3d 1264 (11th Cir. 2000) (recognizing that a "properly filed" state postconviction petition is "pending" under Florida procedure – and consequently tolls the limitations period – until the appellate court's issuance of the mandate on appeal).

[6] December 15, 2002 was a Sunday. *See* FED.R.CIV.P. 6(a).

Petitioner did not file his federal habeas petition until January 8, 2003. Based on the foregoing, the habeas petition is untimely.

Accordingly, it is ORDERED:

Within twenty (20) days of the docketing order of this order, petitioner shall show cause why his federal habeas petition should not be dismissed as untimely.

At Pensacola, Florida this 11th day of December, 2003.

/s/ Miles Davis
MILES DAVIS
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

(Title omitted in printing)

RESPONSE TO SHOW CAUSE ORDER

Petitioner shows that after an opinion from the State Appellate Court becomes final he has 90 days to file a Writ of Certiorari with the United States Supreme Court. Thus, Petitioner had 90 days from November 15, 2002 to file a Federal Habeas Corpus claim.

ARGUMENT

When the State issued a response to the Habeas Corpus claim, they agreed the Petition was timely (p. 3).

In any event the Judge writes that the claim was 23 days too late. The Judge previously assigned to this case took one year, long after the State's response and my reply, to tell me I was 23 days too late.

I

As written in Supreme Court Rules 13.3: The 90 day period for filing a petition for a writ of certiorari seeking review of a decision of a state appellate court runs from the date of the state court's opinion. That means every time after a state appellate court's decision the Petitioner has 90 days to file a writ to the U.S.S.C. Petitioner had 90 days after denial of the Motion for a rehearing by the state appellate court to file a writ of certiorari. Petition had 90 days after Nov. 15, 2002.

The opinion was filed on October 9 but that did not become final until disposition of Motion for Rehearing. That was November 15 (see attached). Thus, Petitioner's 90 days to file a writ seeking review of the Appellate court's affirmation of the 3.850 ineffective assistance claim started on Nov.

15, 2002. Petitioner's habeas corpus claim was timely filed on Jan. 8, 2003.

For the purposes of starting the clock on § 2255's one year limitation period, a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction. When the appellate court per curiam affirms Petitioner's appeal of the denial of the 3.850 motion it becomes, in effect, another affirmation of the conviction. Thus the Petitioner has 90 days to file a writ to the United States Supreme Court.

II

For 352 days the Petitioner sat in state custody demanding his trial transcripts which were being kept from him by Public Defenders who were passing it amongst themselves.

Long after the formal appeal was disposed of the Public Defenders, first Jamie Spivey and then another Public Defender kept the transcripts from the Defendant. Petitioner needed the trial transcripts for his ineffective claim and filed a complaint with the Florida Bar. No action was taken.

CONCLUSION

Petitioner's Habeas Corpus claim was timely filed on Jan. 8, 2003. Even the State agrees with this.

/s/ Patrick A. Day P03864
500 Ike Steele Rd.
Wewahitchka, FL 32465

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing response to show cause order has been furnished by regular U.S. mail to Charles McCoy, Attorney General State of Florida PL 01, The Capital, Tallahassee, FL 32399 on this date Dec. 29, 2003.

/s/ Patrick A. Day

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

(Title omitted in printing)

OBJECTION TO REPORT AND RECOMMENDATION

Petitioner received Report on January 12, 2004 and respectfully files this objection. Petitioner maintains State gave up the untimeliness argument when they stated Habeas petition was timely.

The Magistrate Judge in this case has filed the report and recommendation and asserts Petitioner was untimely in filing his petition. Rule 4 of 2254 cases clears this matter up.

ARGUMENT

After the Habeas Corpus petition was filed on January 8, 2003 the Magistrate Judge M. Casey Rogers sent an order to the state on the 4th of February 2003. The order said the petition is in "proper form" and ordered the state to reply. Rule 4 of 2254 cases shows: "If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer . . . " This was the judge's time to dismiss Day's petition.

At the bottom of the order it states "If these defenses are not raised in the response, they will be considered waived."

On the 17th of March the Senior Assistant Attorney General filed an extensive answer to the petition containing many attachments. At the very beginning on p. 3 it states, "Based on these events, Respondent agrees the petition is timely."

In Judge Davis' Report and Recommendation Jackson v. Secretary is cited to show the district court has discretion to raise sua sponte the timeliness. That is true. But a distinction must be made here. This case from the 11th Circuit as well as cases from other circuits such as Hill v. Braxton (4th Cir.) and Herbst v. Cook (9th Cir.) deal with the judge dismissing before ordering the State to respond.

Hill states: "Our point is simply that when a federal habeas court, in its discretion, raises an affirmative defense before the state has even entered a responsive pleading, it acts consistently with Rule 4." The dispositive issue here is the proper interpretation and applicability of Rule 4 governing 2254 cases. Rule 4 authorizes the district court to sua sponte raise an affirmative defense in its preliminary consideration. However, here the district court raises the defense beyond its preliminary consideration. A footnote to Herbst states "... our holding today is not meant to suggest that a district court is required to raise the statute of limitations sua sponte, but merely that is has the authority to do so."

Scott v. Collins, 286 F.3d 923 (6th Cir. 2002) deals with this issue specifically. Scott argues that Rule 4 does not give a court continuing power to dismiss sua sponte the case after the court orders respondent to file an answer. In short, Rule 4 gives a district court the ability to dismiss habeas petitions sua sponte but that ability expires when the judge orders a respondent to file an answer or take other appropriate action. Thus the district court's sua sponte dismissal after it ordered respondent to answer and after respondent answered was ... an impermissible curing of the respondent's waiver.

In the instant case the respondent waived the statute of limitations defense. Therefore the district court's sua sponte action improperly cured respondent's waiver.

CONCLUSION

Petitioner should be given an evidentiary hearing based on grounds raised. Petition should be heard because timeliness issue is now no longer a consideration. The Respondent stated petition was timely.

/s/ Patrick A. Day P03864
Gulf C.I.
500 Ike Steele Rd.
Wewahitchka, FL 32465

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing objection to report and recommendation has been furnished by regular U.S. Mail to counsel for the defendant Charles Richey McCoy Attorney General State of FL PL01 The Capitol, Tallahassee FL 32399 on this date January 15, 2004.

/s/ Patrick A. Day

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-10778

PATRICK DAY,

Petitioner-Appellant,

versus

JAMES CROSBY,

Respondent-Appellee.

ORDER:

Because appellant has satisfied the standard set forth by the United States Supreme Court in Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000), appellant's motion for certificate of appealability is GRANTED on the following issue only:

> Whether the district court erred in addressing the timeliness of appellant's habeas corpus petition, filed pursuant to 28 U.S.C. § 2254, after the appellee had conceded that appellant's petition was timely.

Appellant's motion for leave to proceed on appeal in forma pauperis is GRANTED.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
NOV 30 2005
OFFICE OF THE CLERK

No. 04-1324

In the Supreme Court of the United States

PATRICK A. DAY,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

28 U.S.C. § 2244(d) establishes a one-year limitations period for federal habeas corpus petitions filed by state prisoners. When Patrick Day filed his federal habeas petition, the magistrate judge examined it as required by Habeas Rule 4 and ordered the State to respond. In its answer, the State did not raise a limitations defense. Instead, it expressly conceded that Day's petition was timely. Nevertheless, almost a year after the petition was filed and eight months after the parties finished briefing the merits of Day's claims, the magistrate judge recommended *sua sponte* that the petition be dismissed as untimely. The district court adopted that recommendation and the Eleventh Circuit affirmed. Acknowledging a conflict with decisions of the Sixth and Ninth Circuits, the Eleventh Circuit held that the State's failure to plead limitations was not a waiver and that Rule 4 – contrary to its plain text – authorizes a court to dismiss a habeas petition *sua sponte* after an answer has been filed.

This case presents the following important questions on which the courts of appeals are divided:

1. Does the State waive a limitations defense to a habeas corpus petition when it fails to plead or otherwise raise that defense and expressly concedes that the petition was timely?

2. Does Habeas Rule 4 permit a district court to dismiss a habeas petition *sua sponte* after the State has filed an answer based on a ground not raised in the answer?

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 391 F.3d 1192. The report and recommendation of the magistrate judge (Pet. App. 8a-15a) and the order of the district court adopting that recommendation and dismissing the petition (*id.* at 7a) are unreported.

JURISDICTION

The court of appeals entered judgment on November 29, 2004. Justice Kennedy extended the time for filing a certiorari petition to March 30, 2005, and the petition was filed on that date. This Court granted the petition on September 27, 2005. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

Pertinent portions of 28 U.S.C. §§ 2244(d) and 2263, Federal Rules of Civil Procedure 8, 12, and 81, Habeas Rules 4, 5, and 11, and former Habeas Rules 4 and 5 are set out in an Addendum at the end of this brief.

STATEMENT

A. Rules Governing The Habeas Statute Of Limitations

When a state prisoner files a petition for a writ of habeas corpus in federal court, one defense that the State may assert is limitations. Under 28 U.S.C. § 2244(d)(1), the prisoner has one year from the date his conviction and sentence become final on direct review to file a federal habeas petition. The courts of appeals have held that direct review is complete – and the limitations period begins to run – upon either the conclusion of certiorari proceedings in this Court or the expi-

ration of the 90-day period for seeking certiorari.[1] If the prisoner later files an application for state post-conviction review, the federal limitations period is tolled while that application is "pending." 28 U.S.C. § 2244(d)(2).

When a state prisoner's petition is untimely under this statute, courts have held that a judge may dismiss it summarily before ordering the State to answer. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rule 4") provides that "the judge must promptly examine [the petition]. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief * * *, the judge must dismiss the petition * * *. If the petition is not dismissed, the judge must order the respondent to file an answer * * *."[2]

While this case was pending below, the Habeas Rules contained no procedures for considering a limitations issue following an order to answer. Thus, the Federal Rules of Civil Procedure ("Civil Rules") supplied those procedures. See Fed. R. Civ. P. 81(a)(2); Habeas Rule 11. The Civil Rules provide that "[i]n pleading to a preceding pleading, a party *shall* set forth affirmatively * * * statute of limitations * * * and any other * * * affirmative defense." Fed. R. Civ. P. 8(c) (emphasis added). Similarly, the rules require that "[e]very defense, in law or fact, to a claim for relief in any pleading * * * shall be asserted in the responsive pleading thereto if one is required * * *." Fed. R. Civ. P. 12(b). This mandatory pleading requirement has recently been incorpo-

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[1] *E.g.*, *Locke* v. *Saffle*, 237 F.3d 1269, 1272-73 (10th Cir. 2001); *cf. Clay* v. *United States*, 537 U.S. 522, 524-25, 527 (2003) (reaching same conclusion under § 2255).

[2] The quoted language is from the rule currently in force. Although the rule was amended effective December 1, 2004, after the lower courts' decisions in this case, the Advisory Committee notes state that no substantive change was intended regarding the quoted portion of the rule. The prior rule appears in the Addendum, *infra*.

rated into Habeas Rule 5(b), which says that "[t]he answer * * * *must* state whether any claim in the petition is barred by * * * a statute of limitations." (Emphasis added).

As the Eleventh Circuit acknowledged, a party's failure to plead an affirmative defense as required by these rules constitutes a waiver of that defense. Pet. App. 4a. In this case, Day contends – and other circuits agree – that the State implicitly waived (*i.e.*, forfeited) any limitations defense by failing to plead or otherwise raise it in the district court. The State also expressly waived the defense by conceding in its answer that Day's petition was timely.

B. Day's Trial And Direct Appeal

The relevant events begin with Day's trial and direct appeal. For the Court's convenience, a timeline of significant dates appears in the Appendix to the Petition at page 16a.

Day was indicted for first-degree murder and tried in the Circuit Court of Escambia County, Florida. In September 1998, the jury convicted him of second-degree murder and found that he carried a weapon during the offense. J.A. 1, 10.[3] Although the sentencing range for this crime was approximately 21-35 years, the trial judge departed upward and sentenced Day to 55 years in prison. The judge based this sentence on his own findings that (1) Day's record indicated an escalating pattern of criminal conduct, and (2) Day engaged in an elaborate cover-up of the crime. J.A. 1, 23.[4]

The public defender appealed Day's sentence to Florida's First District Court of Appeal. On December 21, 1999, the

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[3] See also Ex. A-3. Materials regarding Day's trial, direct appeal, and state post-conviction motion were attached as exhibits to the State's federal habeas corpus answer (Dkt. No. 7), excerpts of which appear at J.A. 23-25. In this brief, all citations to "Ex." refer to exhibits to the State's answer unless otherwise noted.

[4] See also Ex. C; Ex. D at 3.

court affirmed. *Day* v. *State*, 746 So. 2d 1219 (Fla. 1st DCA 1999). It rejected the trial judge's first reason for departure, holding that Day's record did not show an escalating pattern of criminal conduct. *Id.* at 1220. As to the second reason, although the Florida Supreme Court had held that efforts to cover up a murder were not a valid ground for departure,[5] the court of appeal concluded that Day's trial counsel did not preserve that argument. *Ibid.*

Day did not file a petition for a writ of certiorari asking this Court to review the court of appeal's decision.[6] His last day to do so was March 20, 2000. See Sup. Ct. R. 13.

C. Day's State Post-Conviction Review

On March 9, 2001, Day filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. J.A. 10-13. The *pro se* motion alleged several claims of ineffective assistance by trial counsel. The state trial court denied the motion, J.A. 2, and Day appealed.

On October 9, 2002, the court of appeal affirmed the denial of Day's motion without opinion. J.A. 14. Day's motion for rehearing was denied on November 15. J.A. 15. The court of appeal issued its mandate on December 3, 2002. J.A. 16. Day did not file a certiorari petition with this Court, and his last day to do so was February 13, 2003. Sup. Ct. R. 13.3.

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[5] *Smith* v. *State*, 620 So. 2d 187 (Fla. 1993) (per curiam); *Connelly* v. *State*, 704 So. 2d 590, 591 (Fla. 4th DCA 1997); see also *Rendon* v. *State*, 690 So. 2d 645, 647-48 (Fla. 4th DCA 1997) (discussing continued validity of *Smith*).

[6] Because the court of appeal was the highest state court in which a decision could be had, this Court had jurisdiction to review that decision by writ of certiorari. 28 U.S.C. § 1257(a); see Pet. 5 n.5.

D. The District Court Dismisses Day's Federal Petition *Sua Sponte*

Instead, Day drafted a federal petition for a writ of habeas corpus, which he provided to the prison authorities for mailing on January 8, 2003.[7] J.A. 17-20. Day's *pro se* petition generally repeated the claims of ineffective assistance raised in his state post-conviction motion.

The magistrate judge examined the petition as required by Habeas Rule 4 and determined it was "in proper form." J.A. 21-22. She ordered the State to file an answer within 45 days. Consistent with the version of Habeas Rule 5 then in force, the order stated that the answer should address whether Day had exhausted his state remedies and, if not, whether they were procedurally barred. The order provided that those defenses would be waived if not raised in the answer.

On March 19, 2003, the State filed an answer. J.A. 23-25. The State did not assert the limitations bar of 28 U.S.C. § 2244(d) in its answer or in any other district court filing. Moreover, its answer expressly stated that "Respondent agrees the petition is timely; filed after 352 days of untolled time." J.A. 24. The State then spent 28 pages addressing the merits of Day's claims. The magistrate judge allowed Day to file a reply, which he did on April 2, 2003. J.A. 6. In June, the case was referred to a different magistrate judge.

On December 11, 2003, nearly a year after the petition was filed and eight months after the parties finished briefing the merits of Day's claims, the magistrate judge issued a *sua sponte* order stating that the petition was untimely and requiring Day to show cause why it should not be dismissed. J.A. 26-30. Day responded that his petition was timely for three

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[7] The courts of appeals have applied the "prison mailbox" rule of *Houston* v. *Lack*, 487 U.S. 266, 270 (1988), to determine the date on which a prisoner's habeas corpus petition is filed. *E.g.*, *Noble* v. *Kelly*, 246 F.3d 93, 97-98 (2d Cir. 2001) (per curiam).

reasons: (1) the State's answer agreed it was timely; (2) the statutory tolling period included the time for seeking certiorari on state post-conviction review; and (3) the public defender who handled his direct appeal refused to provide him with the trial transcript for almost a year. J.A. 31-32.

The magistrate judge disagreed and issued a report recommending that Day's petition be dismissed. Pet. App. 8a-15a. The judge noted that 353 days had elapsed between the expiration of the time for seeking certiorari on direct review (March 20, 2000) and the beginning of the tolling period for state post-conviction review (March 9, 2001). He stated that Eleventh Circuit precedent excluded from the tolling period the time for seeking certiorari on state post-conviction review. Thus, the judge held that tolling ended when the court of appeal issued its mandate on December 3, 2002, and that the one-year limitations period expired 12 days later on December 16, 2002. Because Day's petition was not filed until January 8, 2003, it was 23 days late. The judge concluded that Day's difficulty obtaining the transcript did not warrant equitable tolling and recommended dismissal of the petition.

Day filed a timely objection to the report, arguing that the magistrate judge's *sua sponte* action was not authorized by Habeas Rule 4 and improperly cured the State's waiver of the limitations defense. J.A. 34-36. The district court adopted the report and dismissed Day's petition. Pet. App. 7a. The court also denied Day a certificate of appealability. The Eleventh Circuit, however, granted him a certificate to determine "[w]hether the district court erred in addressing the timeliness of appellant's habeas corpus petition * * * after the appellee had conceded that [it] was timely." J.A. 37.

E. The Eleventh Circuit Affirms

On appeal, the Eleventh Circuit affirmed the dismissal. Pet. App. 1a-6a. The court began by reviewing the dates relevant to the issue of limitations. It agreed with the magistrate judge that the tolling period ended when the court of appeal

issued its mandate affirming the denial of state post-conviction relief, not when Day's time to seek certiorari review of that decision expired. *Id.* at 2a-3a. Thus, it held that the petition was 23 days late, making the State's concession of timeliness "patently erroneous." *Id.* at 2a, 4a.

Turning to the State's failure to assert the limitations bar, the court noted that limitations is an affirmative defense that is waived if not pleaded "[i]n an ordinary civil case." Pet. App. 4a. Yet it held that habeas cases are not controlled by this rule. Even after the State files an answer that does not plead limitations, the court reasoned, Habeas Rule 4 allows the district judge to dismiss the petition as untimely *sua sponte*. *Id.* at 4a-5a. It also concluded that federal courts have "an obligation to enforce the federal statute of limitations * * * to promote comity, finality, and federalism." *Id.* at 5a.

SUMMARY OF ARGUMENT

The fundamental issue in this case is whether the State waived the limitations defense of 28 U.S.C. § 2244(d). The State did not plead that defense or otherwise bring it to the district court's attention. To the contrary, it expressly conceded in its answer that Day's habeas petition was timely. Nevertheless, almost a year after the petition was filed, the court dismissed it *sua sponte* as untimely. On these facts, the State waived the limitations defense in two ways.

First, the State implicitly waived the defense by failing to raise it, and the district court erred by imposing the waived defense *sua sponte*. In the adversary system of the Civil Rules, limitations is an affirmative defense that is waived if not pleaded, and courts may not dismiss *sua sponte* based on waived defenses. Under Civil Rule 81, these two rules also apply to habeas cases because they are not inconsistent with AEDPA or the Habeas Rules. AEDPA and the Habeas Rules do not authorize courts to impose defenses *sua sponte* after an answer has been filed, nor do they alter the traditional understanding of limitations as a personal, waivable defense.

Moreover, because Congress has expressly modified the rules of waiver and *sua sponte* dismissal with respect to other defenses, the Court should presume that it did not intend to modify them for AEDPA's limitations defense.

Sound policy supports the conclusion that a district court may not impose a waived limitations defense *sua sponte*. Giving courts discretion to impose such a defense would undermine judicial neutrality, the adversary process, and procedural efficiency and certainty. In addition, there is no need to permit post-answer *sua sponte* dismissals in order to vindicate interests of comity, finality, or federalism. As this Court has recognized, finality is not offended when a generally-applicable Civil Rule provides an exception to AEDPA's limitations period. Furthermore, the limitations period does not implicate comity and federalism because it is not a mechanism for deference to state courts; rather, it cuts off federal habeas review based on a timing rule that state courts never consider. The State's involvement with the federal limitations period is as a party, and federal courts show a State litigant no disrespect by entertaining a claim that it does not contend is barred.

Second, the State expressly waived the limitations defense by conceding that Day's petition was timely. The district court erred by failing to give binding effect to the State's concession, especially given that it was correct. AEDPA's limitations period is tolled by statute while an application for state post-conviction relief is "pending," and this Court has held that an application is pending until its resolution is "final." Because a state court denial of post-conviction relief is not final and remains subject to revision until the time to petition for certiorari expires, tolling continues during the certiorari period. Under this tolling rule, Day's petition was timely and should not have been dismissed. For these reasons, the court of appeals' judgment affirming the dismissal should be reversed.

ARGUMENT

I. A "PERIOD OF LIMITATION" IS AN AFFIRMATIVE DEFENSE THAT COURTS MAY NOT IMPOSE *SUA SPONTE* AFTER IT HAS BEEN WAIVED.

In 28 U.S.C. § 2244(d)(1), Congress created a one-year "period of limitation" for habeas cases. The statute provides no procedures, however, for raising or deciding whether that period has expired. Nor did the Habeas Rules provide any such procedures at the time this case was pending in the district court.[8] In this situation, Congress has determined that courts should resort to the Federal Rules of Civil Procedure ("Civil Rules"), which are "applicable as a general matter to habeas cases." *Slack* v. *McDaniel*, 529 U.S. 473, 489 (2000); see Fed. R. Civ. P. 81(a)(2); Habeas Rule 11. The Civil Rules provide that a limitations defense is waived by default – that is, forfeited[9] – if not pleaded in the answer or otherwise raised in compliance with the procedural rules.

A. Under The Civil Rules, A Litigant Waives Limitations By Failing To Plead It.

A statutory "period of limitation" like the one in § 2244(d)(1) defines the time for bringing suit on a claim; it does not extinguish the right that is the basis for the claim. *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 416-17 (1998); see also *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S.

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[8] New Habeas Rule 5(b) is consistent with the Civil Rules discussed in this part of the brief. See p. 3, *supra*; Part II.C., *infra*.

[9] Strictly speaking, failure to plead an affirmative defense results in a "forfeiture," not a "waiver." Forfeiture is "the failure to make a timely assertion of a right," while waiver is "the intentional relinquishment or abandonment of a known right." *Kontrick* v. *Ryan*, 540 U.S. 443, 458 n.13 (2004). Because most courts use the term "waiver" to describe the result of failing to plead an affirmative defense under Civil Rule 8(c), this brief uses that term as well.

497, 504 (2001). Thus, the Civil Rules treat a "statute of limitations" as an "affirmative defense," not a jurisdictional bar. Civil Rule 8(c); *Cent. States, Se. & Sw. Areas Pension Fund* v. *Navco*, 3 F.3d 167, 173 (7th Cir. 1993) ("[P]eriods of limitations in federal statutes * * * are universally regarded as non-jurisdictional."). Because limitations is a non-jurisdictional affirmative defense, the defendant has the burden of raising it. See *Gomez* v. *Toledo*, 446 U.S. 635, 640 (1980); *Foulk* v. *Charrier*, 262 F.3d 687, 697 (8th Cir. 2001).

It is well established that affirmative defenses generally – and the limitations defense specifically – are waived if a defendant does not plead them in an answer or otherwise raise them in compliance with the rules of procedure. *Kontrick* v. *Ryan*, 540 U.S. 443, 458-59 (2004) ("Time bars * * * generally must be raised in an answer or responsive pleading * * *. Ordinarily, * * * under the Civil Rules, a defense is lost if it is not included in the answer or amended answer.").[10] The principle that failure to plead an affirmative defense results in an implicit waiver of the defense is based on the mandatory language of Civil Rule 8(c), which states that, "[i]n pleading to a preceding pleading, a party *shall* set forth affirmatively

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[10] See also *Eberhart* v. *United States*, 126 S. Ct. 403, 407 (2005) (per curiam) ("[W]here the Government failed to raise a defense of untimeliness until after the District Court had reached the merits, it forfeited that defense."); *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("[A] statute of limitations * * * is subject to waiver, estoppel, and equitable tolling."); Pet. App. 4a; 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1278, at 644-45 (3d ed. 2004) ("It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case * * *."); *id.* at n.12 (collecting cases applying this proposition to limitations defenses). Civil Rule 12(h) alters this waiver rule with respect to certain defenses, but limitations and the other defenses listed in Rule 8(c) are not among them.

* * * statute of limitations." (Emphasis added).[11] Civil Rule 12(b) contains similar mandatory language: "Every defense * * * *shall be asserted* in the responsive pleading," except for certain listed defenses not including limitations. (Emphasis added). Taken together, these rules establish that affirmative defenses are waived if not timely raised.[12]

One rationale for this settled principle of waiver by omission is judicial efficiency. By requiring defendants to raise affirmative defenses early in the litigation, Civil Rule 8(c) gives the court and all parties notice of the issues that will be raised in a case. As a result, the court can quickly identify successful defenses and terminate the proceedings, saving time and expense for itself and the parties. See *Robinson* v.

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[11] *Doubleday & Co.* v. *Curtis*, 763 F.2d 495, 503 (2d Cir. 1985) ("[Rule 8(c)'s] mandatory language has impelled us to conclude that a party's failure to plead an affirmative defense bars its invocation at later stages of the litigation."); see also *Coleman* v. *Ramada Hotel Operating Co.*, 933 F.2d 470, 474-75 (7th Cir. 1991) (quoting Rule 8(c) and stating that "[b]y negative inference, a defendant's omission of an affirmative defense should therefore amount to a waiver."); Wright & Miller, *supra*, § 1278, at 664 ("[T]he waiver of affirmative defenses can be supported upon general statutory construction principles in view of the mandatory character of the language of Rule 8(c).").

[12] Current Civil Rule 8(c) finds it roots in the English Rules Under the Judicature Act (The Annual Practice, 1937) O.19, r.15. See Advisory Committee Note of 1937 to Civil Rule 8(c). The English Rules in force at the time of Civil Rule 8(c)'s adoption read, in pertinent part, that "[t]he defendant or plaintiff * * * must raise by his pleading all matters which show the action or counterclaim not to be maintainable * * * as for instance, * * * Statute of Limitations * * *." The accompanying commentary explained that "no evidence of such matters can, as a rule, be given at the trial if they be not expressly pleaded." These historical roots confirm that the drafters of Rule 8(c) intended that affirmative defenses would be waived if not pleaded.

Johnson, 313 F.3d 128, 134 (3d Cir. 2002). Similarly, one of the primary purposes of limitations is to promote finality and judicial efficiency by relieving courts of "the burden of trying stale claims." *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 428 (1965).[13] If a defendant is not required to raise limitations early in the litigation, however, these efficiency benefits are lost. *United States* v. *Bendolph*, 409 F.3d 155, 173 (3d Cir. 2005) (en banc) (Nygaard, J., dissenting).

Statutes of limitations also serve other purposes, such as ensuring notice of adverse claims and protecting settled expectations against a fact-finding process impaired by "memories [that] have faded" and "evidence [that] has been lost." *Burnett*, 380 U.S. at 428.[14] Because the defendant is in the best position to determine whether these concerns are present in a given case, it is most efficient and appropriate to allow the defendant – not the court – to decide whether it needs the protection of limitations.

B. Under The Civil Rules, Courts May Not Dismiss *Sua Sponte* Based On A Waived Affirmative Defense Unless Authorized By Statute Or Rule.

When a defendant has waived an affirmative defense under the Civil Rules, a court may not use that defense to dis-

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[13] See also *Acosta* v. *Artuz*, 221 F.3d 117, 123 (2d Cir. 2000) (stating that, among other purposes, "the AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources"); *McCuskey* v. *Cent. Trailer Servs., Ltd.*, 37 F.3d 1329, 1333 (8th Cir. 1994).

[14] See also *Bd. of Regents* v. *Tomanio*, 446 U.S. 478, 487 (1980) (explaining that statutes of limitations bar claims that are "likely either to impair the accuracy of the fact-finding process or to upset settled expectations"); *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) ("Statutes of limitations * * * represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time.").

miss the case *sua sponte* unless expressly authorized by statute or rule. The Civil Rules authorize *sua sponte* dismissal only for lack of subject matter jurisdiction,[15] not for limitations or the other affirmative defenses listed in Civil Rule 8(c). The drafters of the Civil Rules thus knew how to authorize *sua sponte* dismissals and chose not to do so with respect to those defenses. Accordingly, under the principle of *expressio unius est exclusio alterius*,[16] courts lack the authority to apply a waived limitations defense *sua sponte* in an ordinary civil case. *Haskell* v. *Washington Twp.*, 864 F.2d 1266, 1273 (6th Cir. 1988) ("Since [limitations] is a waivable defense, it ordinarily is error for a district court to raise the issue *sua sponte*."); *Wagner* v. *Fawcett Publ'ns*, 307 F.2d 409, 412 (7th Cir. 1962) (district court "had no right to apply the statute of limitations sua sponte" after defendant failed to raise it).[17]

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[15] See Fed. R. Civ. P. 12(h)(3) ("*Whenever* it appears by suggestion of the parties *or otherwise* that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." (emphasis added)).

[16] *Leatherman* v. *Tarrant County Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 168 (1993) (applying "*expressio unius*" to Civil Rules).

[17] See also *Bendolph*, 409 F.3d at 172 (Nygaard, J., dissenting) ("[G]enerally it is not appropriate for a court to *sua sponte* raise non-jurisdictional defenses not raised by the parties."); *Hutcherson v. Lauderdale County*, 326 F.3d 747, 757 (6th Cir. 2003); *Kropelnicki* v. *Siegel*, 290 F.3d 118, 130 n.7 (2d Cir. 2002); *Marshall-Mosby* v. *Corporate Receivables, Inc.*, 205 F.3d 323, 327 (7th Cir. 2000); *Warnock* v. *Pecos County*, 116 F.3d 776, 778 (5th Cir. 1997); *Davis* v. *Bryan*, 810 F.2d 42, 44 (2d Cir. 1987); *Doubleday*, 763 F.2d at 502 ("[T]he legal parameters of a given dispute are framed by the positions advanced by the adversaries, and may not be expanded *sua sponte* by the trial judge."); Wright & Miller, *supra*, § 1278, at 687-88 ("Several courts of appeals have held that the district court may dismiss a claim *sua sponte* based on an af-

This rule against courts imposing waived affirmative defenses *sua sponte* is supported by the structure of our adversary system as well as practical considerations. As a structural matter, an adversary system requires parties and not courts to raise relevant issues. *McNeil* v. *Wisconsin*, 501 U.S. 171, 181 n.2 (1991). The adversary process is compromised when a court unilaterally assists one party in conceiving and applying affirmative defenses that the party has waived. *Doubleday & Co.* v. *Curtis*, 763 F.2d 495, 502 (2d Cir. 1985) (framing of issues by parties is a "cardinal principle" of the adversarial system and *sua sponte* consideration runs "counter to the spirit of fairness embodied in the Federal Rules of Civil Procedure"); see *Smith* v. *Horn*, 120 F.3d 400, 409 (3d Cir. 1997) ("[W]here the [S]tate has never raised the issue at all, in any court, raising the issue sua sponte puts us in the untenable position of ferreting out possible defenses upon which the state has never sought to rely. When we do so, we come dangerously close to acting as advocates for the [S]tate rather than as impartial magistrates.").

In addition, if courts could apply affirmative defenses *sua sponte* despite a defendant's failure to plead them, the waiver doctrine of Rule 8(c) "would have little meaning." *Haskell*, 864 F.2d at 1273; see also *Bendolph*, 409 F.3d at 175 (Nygaard, J., dissenting) (allowing *sua sponte* dismissal "renders the concept of waiver a nullity"); *Scott* v. *Collins*, 286 F.3d 923, 930 (6th Cir. 2002) (holding that *sua sponte* dismissal "was an impermissible curing of the respondent's waiver"). Absent waiver, a party could seek a favorable ruling on the merits while strategically holding a limitations defense in reserve, thus undermining the judicial efficiency purpose of the defense.

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firmative defense * * * *as long as the defendant has not waived the defense*." (emphasis added)).

C. The Civil Rules On Waiver And *Sua Sponte* Dismissal Apply To AEDPA's Limitations Defense.

The rules governing limitations defenses in ordinary civil cases also apply to the "one-year period of limitation" in § 2244(d)(1). Lower courts agree that AEDPA's limitations period is not a jurisdictional provision but "an affirmative defense that the state bears the burden of asserting." *Hill* v. *Braxton*, 277 F.3d 701, 705 (4th Cir. 2002); see *Nardi* v. *Stewart*, 354 F.3d 1134, 1140 (9th Cir. 2004) ("There is no dispute that AEDPA's statute of limitations is an affirmative defense."); *Bendolph*, 409 F.3d at 164 (reaffirming holding that "limitations period is not jurisdictional and therefore is subject to * * * waiver.").[18]

"Because the § 2254(d) statute of limitations is an affirmative defense, [Civil] Rule 8(c) * * * requires that a party raise it in the first responsive pleading to avoid waiving it." *Scott*, 286 F.3d at 927; see also *Nardi*, 354 F.3d at 1140-41. Several courts have held that Civil Rules 6, 8(c), and 12(b) govern the procedure for calculating and asserting AEDPA's affirmative defense of limitations.[19]

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[18] See also *Acosta*, 221 F.3d at 122 ("The AEDPA statute of limitations is not jurisdictional, and nothing in AEDPA or in the 2254 Habeas Rules indicates that the burden of pleading the statute of limitations has been shifted from the respondent to the petitioner. The AEDPA statute of limitations is therefore an affirmative defense * * *." (citation omitted)); *Jackson* v. *Sec'y for Dep't of Corr.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (per curiam); *Scott*, 286 F.3d at 927; *Kreutzer* v. *Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000); *Davis* v. *Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *Miller* v. *Marr*, 141 F.3d 976, 978 (10th Cir. 1998).

[19] *Robinson*, 313 F.3d at 137 ("[A]ffirmative defenses under AEDPA should be treated the same as affirmative defenses in other contexts, and, if not pleaded in the answer, they must be raised at the earliest practicable moment thereafter" to avoid waiver); see also *Morrison* v. *Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005)

Under the Civil Rules, therefore, the AEDPA limitations defense is waived if not timely raised. *Nardi*, 354 F.3d at 1141 ("[T]he [S]tate waives the statute of limitations by failing to raise the defense in its answer."); *Scott*, 286 F.3d at 928 ("[R]espondent's failure to raise the statute of limitations defense as required by * * * the rules of pleading * * * amounted to a waiver of that defense.").[20] Indeed, this Court has recognized in several habeas cases that affirmative defenses must be raised timely or else they are waived. *Gray* v. *Netherland*, 518 U.S. 152, 165-66 (1996) ("[P]rocedural default is an affirmative defense" that the State is "obligated to raise * * * or lose the right to assert the defense thereafter."); *Schiro* v. *Farley*, 510 U.S. 222, 228-29 (1994) ("The *Teague* [v. *Lane*, 489 U.S. 288 (1989),] bar to the retroactive application of new rules is not * * * jurisdictional" and "a State can

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(applying Civil Rules 8(c) and 12(b) to AEDPA limitations defense); *Hill*, 277 F.3d at 705 (applying Civil Rule 8(c) to AEDPA limitations defense); *Acosta*, 221 F.3d at 121-22 (same); *Libby* v. *Magnusson*, 177 F.3d 43, 49 (1st Cir. 1999) (Civil Rule 8(c) "functions much the same way in habeas corpus jurisprudence"). See also *Wilson* v. *Beard*, 426 F.3d 653, 662 & n.6 (3d Cir. 2005) (holding that Civil Rule 6(a) governs computation of AEDPA period of limitation and collecting cases holding the same).

[20] See also *Bendolph*, 409 F.3d at 164 (reaffirming holding of *Robinson*, 313 F.3d at 134, 137, that "a limitations defense may be waived by a State defendant in a habeas proceeding" if it is not "pleaded in the answer * * * [or] raised at the earliest practicable moment thereafter"); *Crews* v. *Horn*, 360 F.3d 146, 150 n.2 (3d Cir. 2004) (State waived limitations defense by not pleading it in answer or at "earliest practicable moment"); *Stewart* v. *Hendricks*, 71 Fed. Appx. 904, 906 (3d Cir. 2003) (unpublished) (State waived limitations defense when it "never even mentioned the limitations defense in any pleading"); *Davis* v. *LeMaster*, 216 F.3d 1086 (table), 2000 WL 702408 at *1 n.2 (10th Cir. May 26, 2000) (unpublished) (limitations period was not jurisdictional and was waived by State's failure to raise it); *United States ex. rel. Galvan* v. *Gilmore*, 997 F. Supp. 1019, 1026 (N.D. Ill. 1998) (same).

waive the *Teague* bar by not raising it.").[21] Furthermore, the near-universal recognition that AEDPA's limitations period can be equitably tolled supports the conclusion that it can also be waived.[22]

Once the limitations defense has been waived, courts are not obligated to impose it *sua sponte* as the State and Eleventh Circuit assert. *Cf.* Pet. App. 5a; Opp. 7. That position is contrary to *Trest* v. *Cain*, 522 U.S. 87 (1997), which held that an appeals court was "not required" to consider procedural default *sua sponte* in habeas cases because it is a non-jurisdictional affirmative defense that the State normally is "obligated to raise * * * [or] lose the right to assert * * *." *Id.* at 89 (internal quotation marks omitted); see also *Collins* v. *Youngblood*, 497 U.S. 37, 40-41 (1990) (declining to decide non-retroactivity issue *sua sponte* when State failed to raise that defense in a habeas case). Likewise, because limitations is a non-jurisdictional affirmative defense, the State must raise it or waive it.

When a State fails to raise AEDPA's limitations defense in compliance with the Civil Rules, a court may not cure the State's waiver by dismissing the petition *sua sponte* as untimely. *Nardi*, 354 F.3d at 1141 (holding that a "district court lacks the authority to *sua sponte* dismiss a habeas petition as

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[21] *Cf. Rumsfeld* v. *Padilla*, 124 S. Ct. 2711, 2728 (2004) (Kennedy, J., concurring) (objection to location of filing habeas petition can be waived by government); *McCleskey* v. *Zant*, 499 U.S. 467, 494 (1991) ("[T]he government bears the burden of pleading abuse of the writ."); *Granberry* v. *Greer*, 481 U.S. 129, 135-36 (1987) (rejecting argument that non-exhaustion defense is unwaivable).

[22] *Robinson*, 313 F.3d at 134 ("[B]ecause the AEDPA limitations period is subject to equitable modifications such as tolling, it is also subject to other non-jurisdictional, equitable considerations, such as waiver."); see 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice & Procedure* § 5.2a, at 235 & n.19 (4th ed. 2001) (collecting cases applying equitable tolling).

time-barred after the [S]tate files an answer which fails to raise the statute of limitations defense."); *Scott*, 286 F.3d at 930 (post-answer *sua sponte* dismissal "was an impermissible curing of the [State's] waiver.").[23] This Court frequently criticizes such *sua sponte* rulings in the habeas context, observing that adversarial briefing and argument is the fairest and most efficient way to resolve disputes, *Trest*, 522 U.S. at 92, and that *sua sponte* rulings upset settled expectations. *Bell* v. *Thompson*, 125 S. Ct. 2825, 2831, 2836-37 (2005) (holding that appeals court abused its discretion by *sua sponte* amending an earlier decision denying habeas corpus relief when there was no "miscarriage of justice" and parties expected that litigation had ended).[24]

Here, although the State never raised a limitations defense in the district court at any time, the court skirted the adversary process and cured the State's waiver by dismissing Day's petition as untimely *sua sponte*. Moreover, it did so almost a year after the petition was filed, upsetting both parties' expectations that the considerable time and expense spent briefing the merits of Day's petition would yield a decision on the merits. *Pino* v. *Ryan*, 49 F.3d 51, 53 (2d Cir. 1995). Under the principles discussed above, this *sua sponte* dismissal was error and should be reversed.

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[23] See also *Stewart*, 71 Fed. Appx. at 906 (waivability of the limitations defense "effectively forecloses" the argument that "a district court may raise the AEDPA's limitations provision *sua sponte*" when State never raised it); Part I.B., *supra*.

[24] See also *Castro* v. *United States*, 540 U.S. 375, 383 (2003) (district court may not *sua sponte* recharacterize petitioner's motion as a § 2255 petition without giving notice and opportunity to amend); *Calderon* v. *Thompson*, 523 U.S. 538, 558 (1998) (it is abuse of discretion for court in habeas case to recall its mandate *sua sponte* absent a "miscarriage of justice").

II. NEITHER AEDPA NOR THE HABEAS RULES AUTHORIZE *SUA SPONTE* DISMISSAL BASED ON LIMITATIONS AFTER AN ANSWER HAS BEEN FILED.

The court of appeals recognized that, "[i]n an ordinary civil case, a failure to plead the bar of the statute of limitations constitutes a waiver of the defense." Pet. App. 4a (internal quotation marks omitted). Yet it mistakenly concluded that "a habeas case that is governed by AEDPA is not controlled by this rule." *Ibid.* It based this conclusion on a selective reading of Habeas Rule 4 and a perceived "obligation" to enforce AEDPA's statute of limitations to promote policies of "comity, finality, and federalism." *Id.* at 5a.

The court of appeals' analysis is flawed because it does not ask the proper question: are the Civil Rules on waiver and *sua sponte* dismissal "not inconsistent" with the habeas statutes and rules? As discussed below, neither AEDPA nor the Habeas Rules address – much less authorize – post-answer *sua sponte* dismissal based on a waived limitations defense. Accordingly, the Civil Rules discussed above apply.

A. The Civil Pleading Rules Apply In Habeas Cases If They Are Not Inconsistent With AEDPA Or The Habeas Rules.

As this Court has noted, the Civil Rules are "applicable as a general matter to habeas cases." *Slack*, 529 U.S. at 489. The basis for this principle is Civil Rule 81(a)(2), which provides that the Civil Rules "are applicable to proceedings for * * * habeas corpus * * * to the extent that the practice in such proceedings is not set forth in statutes of the United States * * * or the [Habeas] Rules * * * and has heretofore conformed to the practice in civil actions." Of course, before the Civil Rules, some areas of habeas practice (*e.g.*, discovery) differed substantially from the procedures governing ordinary civil actions. See *Harris* v. *Nelson*, 394 U.S. 286, 294 (1969). But in other areas, habeas practice conformed to that

of civil actions. See, *e.g.*, *Browder* v. *Director, Dep't of Corr.*, 434 U.S. 257, 270 (1978).

In these latter areas, the Civil Rules apply to matters of procedure not directly addressed by a habeas statute or rule. *Ibid.* (holding that Civil Rules applied where "[n]o other statute of the United States is addressed to" the issue). This Court's subsequent cases confirm the general principle that "[t]he Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the [statutes or] Habeas Corpus Rules." *Woodford* v. *Garceau*, 538 U.S. 202, 208 (2003); see *ibid.* ("Nothing in the Habeas Corpus Rules contradicts [Civil] Rule 3. The logical conclusion, therefore, is that a habeas suit begins with the filing of an application for habeas corpus relief – the equivalent of a complaint in an ordinary civil case.").[25]

The Civil Rules at issue here establish basic pleading practices and reflect the fundamental concept that once a moving party asserts a right to relief, the burden shifts to the opposing party to show why relief should not be granted (either on the merits or by interposing a defense). These concepts are also basic to habeas corpus practice, both historic and modern.

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[25] See also Habeas Rule 11; *Gonzalez* v. *Crosby*, 125 S. Ct. 2641, 2646-48 (2005) (holding that "Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only 'to the extent that [it is] not inconsistent with' applicable federal statutory provisions and rules," and concluding that while some uses of rule would circumvent statutory requirements, others were not inconsistent with the text of any statute or rule); *Mayle* v. *Felix*, 125 S. Ct. 2562, 2574-75 (2005) (applying Civil Rule 15(c)(2) in habeas case and adopting interpretation of rule "consistent with [its] general application * * * in civil cases"); *Kiser* v. *Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) ("[W]here the [Habeas Rules] are silent on an issue, Rule 11 compels us to follow the Federal Rules of Civil Procedure.").

Prior to the Civil Rules, "pleadings" in habeas cases functioned as those in ordinary civil actions. See 1 Thomas C. Spelling, *A Treatise on Extraordinary Relief in Equity and at Law* 1081 (1893) ("While strictly speaking, owing to the summary character of the proceeding, there are no pleadings in habeas corpus, yet for all practical purposes the petition * * * is treated as a complaint, and the return as an answer in an ordinary civil action."); *id.* at 1084 ("With reference to the degree of certainty required in returns [answers], it may be stated simply that the ordinary rules are applied as in civil actions generally."). Likewise, if a habeas petitioner properly pleaded a right to relief, the respondent had the burden to plead the reasons why the writ should not issue. *Ibid.* ("Strict correctness [in the return] is not required; but the facts necessary to warrant the detention must be alleged."). The current habeas statute retains this feature. See 28 U.S.C. § 2243 ("A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the *respondent to show cause* why the writ should not be granted * * *. * * * The person to whom the writ or order is directed shall make a return certifying the true cause of the detention." (emphasis added)).

Thus, pleading practices in general and the burden of disproving the claimant's entitlement to relief in particular have been substantially the same in habeas cases as in other civil actions. Accordingly, the civil pleading rules apply to habeas cases to the extent they are not inconsistent with any habeas statutes or rules.

B. The Civil Pleading Rules Are Not Inconsistent With AEDPA.

Congress chose to call its one-year deadline for filing habeas petitions a "period of limitation." 28 U.S.C. § 2244(d)(1). Nothing in AEDPA's text or legislative history alters the traditional understanding that a period of limitation is a non-jurisdictional, waivable affirmative defense.

1. "[W]here Congress uses terms that have accumulated settled meaning under * * * the common law, a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of these terms." *Neder* v. *United States*, 527 U.S. 1, 21 (1999) (internal quotation marks omitted); see also *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 383 (2004) (courts should not give "familiar statutory language a meaning foreign to every other context in which it is used."). The term "period" or "statute" of limitations, while foreign to habeas law prior to the passage of AEDPA, has a well-established common-law meaning.

Statutes of limitations are "pervasive" in the civil context; legislatures have applied them to nearly all civil causes of action to encourage the "reasonably diligent presentation" of claims. *United States* v. *Kubrick*, 444 U.S. 111, 117, 123 (1979). As discussed in Part I above, these civil limitations periods are uniformly interpreted as non-jurisdictional and thus waivable affirmative defenses that courts may not impose *sua sponte* after they have been waived.

Likewise, limitations periods in federal criminal law are non-jurisdictional affirmative defenses "that will be considered waived if not raised in the district court" by the defendant. *United States* v. *Karlin*, 785 F.2d 90, 92-93 (3d Cir. 1986); see also *United States* v. *Arky*, 938 F.2d 579, 581-82 (5th Cir. 1991) (per curiam). Courts have reached this conclusion even through many criminal statutes of limitations contain mandatory language that is absent from § 2244(d)(1), such as: "[N]o person shall be prosecuted * * * unless the indictment is found * * * within five years next after such offense shall have been committed." 18 U.S.C. § 3282(a). Moreover, this conclusion raises an issue of fairness: if a criminal defendant can waive a statute of limitations by failing to raise it – thus allowing the State to proceed with an untimely prosecution – the State should be held to the same standard regarding timely assertion of its limitations defense in habeas cases.

2. There is no indication in § 2244(d)(1) that Congress intended to alter this general understanding of limitations periods as affirmative defenses that courts may not impose *sua sponte* after they have been waived. To the contrary, under the analytical framework of *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the text of the statute confirms this interpretation of "period of limitation."

Zipes analyzed the text, legislative history, and statutory purpose of the limitations period for filing discrimination charges under Title VII of the Civil Rights Act of 1964 and concluded that it was a waivable affirmative defense, not a jurisdictional bar. 455 U.S. at 393. The Court first examined the structure of Title VII, noting that the provision granting district courts jurisdiction "contain[ed] no reference to the timely-filing requirement" and, in fact, "appear[ed] as an entirely separate provision." *Id.* at 393-94. In addition, the timely filing requirement did not "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 394.

The same can be said of AEDPA's period of limitation. The provision granting jurisdiction to the district courts (28 U.S.C. § 2241) appears in an entirely separate section of the statute and does not mention § 2244(d)(1)'s period of limitation. Nor does the text of § 2244(d)(1) speak in jurisdictional terms or "purport to limit the jurisdiction of the district courts in any way." *Miller* v. *N.J. State Dep't of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998); see also *Dunlap* v. *United States*, 250 F.3d 1001, 1005 (6th Cir. 2001) (discussing similarly-worded limitation period of 28 U.S.C. § 2255). Thus, as with the statute in *Zipes*, the structure of AEDPA indicates that the one-year time limit operates as an ordinary statute of limitations, not a jurisdictional bar.

Zipes also considered references in the legislative history of Title VII to a "period of limitations" and a "time limitation" to be persuasive evidence that the statute's timely filing

requirement was a waivable affirmative defense. 455 U.S. at 394. The same is true of AEDPA's legislative history (see *Dunlap*, 250 F.3d at 1005-06; *Miller*, 145 F.3d at 618), and there is a far more significant indication of Congress's intent in § 2244(d)(1): the text itself actually contains the term "period of limitation."

Finally, the Court in *Zipes* looked at the legislative purpose of the Title VII filing requirement: "preventing the pressing of 'stale' claims, the end served by a statute of limitations." 455 U.S. at 394. The legislative history of AEDPA indicates that its various filing requirements serve a similar purpose: "to curb the *abuse* of the statutory writ of habeas corpus, and to address the acute problems of *unnecessary* delay and abuse in capital cases." H.R. Conf. Rep. No. 104-518, at 111 (1996), reprinted in 1996 U.S.C.C.A.N. 944 (emphasis added). Their objec "is not to produce default * * * [but] to stimulate the orderly and expeditious consideration on the merits of all federal issues * * *." 135 Cong. Rec. S13484 (daily ed. Oct. 16, 1989) (Committee report and proposal from the Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Aug 23, 1989). Construing § 2244(d)(1) as an ordinary statute of limitations – in other words, as a non-jurisdictional affirmative defense that may be waived or tolled – serves this purpose. *Dunlap*, 250 F.3d at 1006; *Miller*, 145 F.3d at 618.

Taking these factors together, *Zipes* held that the filing period in Title VII was "not a jurisdictional prerequisite * * * but a requirement subject to waiver." 455 U.S. at 398. Because § 2244(d)(1) contains virtually identical signals and even stronger textual support, the AEDPA limitations period is likewise a non-jurisdictional, waivable affirmative defense.[26] Accordingly, it is not inconsistent with the statute to

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[26] *Miller*, 145 F.3d at 618; see also *Dunlap*, 250 F.3d at 1005-07 & n.1; *Harris* v. *Hutchinson*, 209 F.3d 325, 328-29 (4th Cir. 2000); *Moore* v. *United States*, 173 F.3d 1131, 1134 (8th Cir. 1999); *Davis* v. *Johnson*, 158 F.3d at 811.

apply the Civil Rules to determine when waiver occurs and to bar *sua sponte* imposition of a waived limitations defense.

3. As this Court has already recognized, a generally-applicable Civil Rule that provides an exception to AEDPA's one-year limitations period is "not inconsistent" with the statute. In *Mayle* v. *Felix*, the Court acknowledged that Civil "Rule 15(c)(2) relaxes * * * the [AEDPA] statute of limitations" by allowing claims in an amended petition to relate back to claims in the original petition if they share a common core of operative facts. 125 S. Ct. 2562, 2572, 2574-75 (2005). And *Gonzalez* v. *Crosby* held that a Rule 60(b) mo tion to reopen a limitations ruling – which was filed more than a year after the petitioner's habeas proceedings concluded and more than four years after the limitations period expired – "create[d] no inconsistency with the [text of the] habeas statute or rules." 125 S. Ct. 2641, 2645, 2648 (2005). Under these decisions, applying Civil Rules 8(c) and 12(b) to conclude that the State waived the limitations defense in this case is not inconsistent with the statute creating that defense.

4. Congress could have altered the common-law understanding that AEDPA's period of limitation is waivable by default and cannot be imposed by courts *sua sponte* after it has been waived. When Congress intends to alter these variables with respect to a defense, however, it does so explicitly.

For example, AEDPA restricted waiver of the habeas defense of exhaustion, providing that the "State shall not be deemed to have waived the exhaustion requirement * * * unless the State * * * expressly waives the requirement." 28 U.S.C. § 2254(b)(3). This prohibition against implied waiver of the exhaustion defense, coupled with the absence of a similar provision for the limitations defense, indicates that Congress did not intend to protect States against implied waiver of the limitations defense. *Nardi*, 354 F.3d at 1141. As this Court has long recognized, "[w]here Congress includes particular language in one section of a statute but

omits it in another * * *, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).[27]

Furthermore, this prohibition against implied waiver of the exhaustion defense is an acknowledgment by Congress that affirmative defenses in habeas cases ordinarily are waived by failure to raise them. See *Banks* v. *Dretke*, 540 U.S. 668, 705 (2004) (noting that "under pre-AEDPA law, exhaustion and procedural default defenses could be waived based on the State's litigation conduct"). Otherwise, the language of § 2254(b)(3) requiring express waiver of the exhaustion defense would serve no purpose. See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("[I]t is our duty 'to give effect, if possible, to every clause and word of a statute.' We are thus 'reluctant to treat statutory terms as surplusage' in any setting.") (citations omitted). Congress's failure to require express waiver of other affirmative defenses – such as limitations – indicates that it intended ordinary waiver principles to apply.

In other statutes, Congress has chosen to make timely filing requirements expressly jurisdictional and thus altogether unwaivable. See 16 U.S.C. § 825*l*(b); 26 U.S.C. § 6404(h)(1); 33 U.S.C. § 921(c). Had Congress intended to create an unwaivable time limit for filing habeas petitions under AEDPA, it could have modeled § 2244(d)(1) after one of those statutes, making the court's jurisdiction over the petition contingent on timely filing. See *Brown* v. *Director, Office of Workers Compensation Programs* 864 F.2d 120, 123 (11th Cir. 1989) ("[W]e cannot fairly assume that * * * Con-

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[27] See also 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.25, at 327 (6th ed. rev. 2000) ("There is generally an inference that omissions are intentional. This rule is based on logic and common sense. It expresses the concept that when people say one thing they do not mean something else.").

gress intended the 60-day filing period [of 33 U.S.C. § 921] to be in the nature of a statute of limitations when it uses the word 'jurisdiction' in the statute.").[28] The term "jurisdiction" does not appear in § 2244(d)(1), however.

Finally, if Congress had wanted to authorize courts to dismiss untimely habeas petitions *sua sponte* at any stage of the case, regardless of whether the limitations defense had been waived, it could have done so expressly as it did in the Prison Litigation Reform Act ("PLRA"). The PLRA, which governs *in forma pauperis* cases, provides that "the court shall dismiss the case *at any time* if the court determines that * * * the action or appeal * * * fails to state a claim on which relief may be granted * * *." 28 U.S.C. § 1915(e)(2) (emphasis added).[29] Courts have interpreted this provision to allow *sua sponte* dismissal at any time for a variety of reasons, including limitations. See *Gartrell* v. *Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993) (per curiam) (holding that "[a]lthough the defense of limitations is an affirmative defense, which usually must be raised by the defendants in the district court, * * * the district court may raise the defense *sua sponte* in an action proceeding under 28 U.S.C. § 1915.").

In sum, Congress could have used numerous tools to alter ordinary waiver principles or authorize *sua sponte* dismissals expressly, as it has done in several other statutes. Yet Congress did not do so, and this Court should not assume that it did so *sub silentio*. The text of § 2244(d)(1) should thus be interpreted consistently with the traditional understanding of "period of limitation."

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[28] See also *Ky. Util. Co.* v. *FERC*, 789 F.2d 1210, 1214-15 (6th Cir. 1986) (16 U.S.C. § 825*l*); *Gati* v. *Comm'r*, 113 T.C. 132, 134 (1999) (26 U.S.C. § 6404).

[29] The 1996 PLRA amendments to § 1915 re-designated former subsection (d) as subsection (e). Pre-1996 case law thus refers to § 1915(d), although the statute has retained the identical wording.

C. The Civil Pleading Rules Are Not Inconsistent With The Habeas Rules.

The Habeas Rules are not inconsistent with this traditional understanding of limitations. Like the Civil Rules, the Habeas Rules prohibit post-answer *sua sponte* dismissals by implication.

The court of appeals reached a contrary conclusion after quoting one sentence from Habeas Rule 4, which governs a court's "[p]reliminary [r]eview" of a habeas petition. Pet. App. 5a. To determine the proper scope of Rule 4, however, the sentence chosen by the court of appeals must be read with the one after it:

> "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. ***If the petition is not dismissed***, the judge must order the respondent to file an answer * * *."

Habeas Rule 4 (emphasis added).[30]

The rule's use of the phrase "[i]f the petition is not dismissed" has two consequences. First, it indicates that considering a dismissal and ordering an answer are sequential steps. See *Granberry* v. *Greer*, 481 U.S. 129, 135 n.7 (1987). Second, the phrase implies an either/or situation: either the district court orders a summary dismissal or it orders an answer, but it does not do both. Thus, the plain language of Habeas Rule 4 authorizes only pre-answer summary dismissals. Indeed, even the State concedes that the rule "literally speak[s] to a pre-answer dismissal." Opp. 15.

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[30] This quote is from the current version of Habeas Rule 4 as amended effective December 1, 2004. The Advisory Committee notes state that "no substantive change is intended" regarding the quoted portion of the rule.

Because Habeas Rule 4 authorizes only pre-answer dismissals, standard interpretive canons establish that post-answer summary dismissals are prohibited by negative implication. *Christensen* v. *Harris County*, 529 U.S. 576, 583 (2000) ("When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode."); *cf. Leatherman* v. *Tarrant County Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius.*"). Almost every court that has faced the question has held that Habeas Rule 4 does not authorize post-answer dismissals. See *Bendolph*, 409 F.3d at 157 (case did not "fall[] within the summary dismissal period of [Habeas] Rule 4" after State "filed answer[] that did not raise the AEDPA statute of limitations as a defense"); *Nardi*, 354 F.3d at 1141 ("Rule 4 authorizes a summary dismissal *only prior to a responsive pleading by the state* * * *."); *Scott*, 286 F.3d at 930 (6th Cir. 2002) (Rule 4 power to dismiss petition *sua sponte* "expires when the judge orders a respondent to file an answer"); see also Pet. 11-12 & n.10 (explaining that cases on which Eleventh Circuit relied hold only that Rule 4 allows dismissal *prior to* answer by State).

The above holdings are not only faithful to the rule's plain meaning and standard interpretative canons,[31] they are also supported by the Advisory Committee's notes to Habeas Rule 4. The notes state that the purpose of pre-answer *sua sponte* dismissal is to "screen out frivolous petitions and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Post-answer *sua sponte*

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[31] They are also faithful to the text of 28 U.S.C. § 2243, which provides that a judge shall "issue an order directing the respondent to show cause why the [application for a] writ should not be granted, *unless* it appears from the application that the applicant * * * is not entitled thereto. * * * The person to whom the * * * order is directed shall make a return [*i.e.*, an answer] certifying the true cause of the detention." (emphasis added).

dismissals would not serve that purpose, however, because the burden of answering has already been incurred.

Nor is Habeas Rule 4's distinction between pre- and post-answer dismissals arbitrary. Instead, it conforms to the time-honored adversary principle of the Civil Rules that affirmative defenses not asserted in an answer are waived. If a court could cure such waivers through *sua sponte* post-answer dismissals, that principle would be meaningless. See Part I.B., *supra*.

Limiting Habeas Rule 4 to pre-answer dismissals is also consistent with new Habeas Rule 5(b), which provides that the answer "*must state* whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations." (Emphasis added). Functionally, this language is the same as the mandatory language in Civil Rules 8 and 12, which gives rise to the waiver principle of the Civil Rules. See Part I.A., *supra*. Although the revisions to Habeas Rule 5(b) do not apply to this case,[32] the Advisory Committee "intend[ed] no substantive change with the additional new language." Instead, it concluded that the explicit requirement to plead limitations "conforms to current case law and statutory provisions."

Finally, there is no practical need to expand the limited *sua sponte* dismissal power of Habeas Rule 4 because the Civil Rules already contain procedures for the tardy assertion of defenses. See Fed. R. Civ. P. 15(a) (providing for amend-

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[32] The rule was amended on December 1, 2004, well after the State filed its answer and the magistrate issued his order. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 275 n.29 (1994) ("A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime * * *."); *Richardson Elecs., Ltd.* v. *Panache Broad. of Pa., Inc.*, 202 F.3d 957, 958 (7th Cir. 2000) ("Generally, a new procedural rule applies to the *uncompleted* portions of suits pending when the rule became effective * * *.") (emphasis added).

ments to pleadings). The Civil Rules can thus accommodate situations in which the State did not plead limitations but belated amendment is proper, as when the State lacks the information needed to knowledgeably analyze a limitations issue before it must answer. See *Bendolph*, 409 F.3d at 160-61, 167. Here, the State made no attempt to use such procedures. In fact, the State affirmatively conceded the timeliness of Day's petition. Creating a *sua sponte* dismissal power outside the Habeas and Civil Rules in order to rescue the State from its waiver would simply short-circuit the drafters' contemplation and resolution of this very contingency.

III. POLICY CONCERNS DO NOT AUTHORIZE *SUA SPONTE* DISMISSAL BASED ON A WAIVED LIMITATIONS DEFENSE.

For these reasons, AEDPA and the Habeas Rules are not inconsistent with the ordinary rules applicable to civil litigation, which recognize that (1) limitations is a waivable affirmative defense and (2) courts may not impose waived defenses *sua sponte*. Although the court of appeals acknowledged these rules, it held that they were trumped by an "obligation to enforce the federal statute of limitations * * * to promote [AEDPA's policies of] comity, finality, and federalism." Pet. App. 5a. This conclusion is wrong for three reasons.

A. AEDPA's Purposes Do Not Displace Generally Applicable Civil Rules.

Although certain provisions of AEDPA reflect concerns of comity, federalism, and finality, Congress did not enact "comity, federalism, and finality"; it enacted AEDPA. The purposes underlying AEDPA cannot displace otherwise applicable Civil Rules.

1. Civil Rule 81(a)(2) applies the Civil Rules to habeas proceedings "to the extent that the practice in such proceedings is not set forth in statutes of the United States * * * or

the [Habeas] Rules * * * and has heretofore conformed to the practice in civil actions." As Part II explains, the civil pleading rules at issue here meet each of these conditions: they match the historic requirement that a habeas respondent plead the reasons why the petitioner is not entitled to relief, and they are not inconsistent with AEDPA or the Habeas Rules, which do not authorize the practice of post-answer *sua sponte* dismissal based on an unpleaded limitations defense. Rule 81(a)(2) leaves no room for non-textual policy concerns to alter this conclusion.

This Court's recent decisions confirm that general policy concerns outside the text of relevant statutes and rules cannot alone limit the application of general Civil Rules. In *Gonzalez*, for example, the Court focused on "whether the *text* of [the Civil Rule] itself, or of some other *provision of law*, limits its application in a manner relevant to the case * * *." 125 S. Ct. at 2646 (emphasis added).[33] Because no statutory requirement or habeas rule limits the civil pleading rules that the district court violated by acting *sua sponte*, those rules apply here.

2. Moreover, relying on unwritten AEDPA doctrines to authorize *sua sponte* dismissal at any time would improperly abolish the pre-answer limit that Habeas Rule 4 placed on the summary dismissal power. Because Habeas Rule 4 "deals specifically with" summary dismissals, "this Rule" – not unwritten "'equitable' reasons beyond those embodied" in the

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[33] *Cf.* 125 S. Ct. at 2647-48 (holding that some uses of rule would "circumvent" or "escape" a statutory requirement); *Mayle*, 125 S. Ct. at 2573-74 (considering degree to which application of civil rule would functionally disable habeas statute); *Pitchess* v. *Davis*, 421 U.S. 482, 489 (1975) (per curiam) (holding that civil rule could not be used to raise unexhausted claims given statutory exhaustion requirement); *Harris* v. *Nelson*, 394 U.S. 286, 296 (1969) (holding that civil discovery rules did not apply because statute specifically addressed habeas discovery).

Rule – "should * * * determine[] whether or not the petition's dismissal was appropriate." *Lonchar* v. *Thomas*, 517 U.S. 314, 316 (1996); see *id.* at 322 (holding that court could not "properly dismiss this first habeas petition for special ad hoc 'equitable' reasons not encompassed within the framework" of the Rule).

3. Using policies implicit in AEDPA to displace the Civil Rules regarding waiver and *sua sponte* imposition of defenses also violates the "cardinal principle of statutory construction that repeals by implication are not favored." *United States* v. *United Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976). When Congress wishes to limit or eliminate waiver of a defense or to authorize *sua sponte* dismissal at any time, it says so expressly and unequivocally. See Part II.B, *supra*. Moreover, when Congress perceives a conflict between a habeas statute and a generally applicable federal rule, it "expressly circumscribe[s]" the rule. *Gonzalez*, 125 S. Ct. at 2646 (discussing Fed. R. App. P. 22). Under these circumstances, "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *United States* v. *Wells*, 519 U.S. 482, 496 (1997).

"In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974). Here, AEDPA and the Habeas Rules do not even address waiver or post-answer imposition of a limitations defense; they certainly are not irreconcilable with the Civil Rules on these subjects. See Parts II.B.-C., *supra*. Accordingly, those rules apply to habeas cases notwithstanding AEDPA's implicit policies.

4. Finally, allowing AEDPA's implicit policies to distort the meaning of a generally applicable Civil Rule in a habeas case would undermine the uniformity of the Federal Rules. The same language enacted with the same intent would mean

different things when applied to different kinds of cases. To interpret the Federal Rules in such a way "would be to invent [rules] rather than interpret [them]." *Clark* v. *Martinez*, 125 S. Ct. 716, 722-23 (2005). In addition, because litigants would not know ahead of time how the Federal Rules would be applied in different cases, procedural certainty would be threatened. Such uncertainty impairs not only the uniformity of the Federal Rules but also the dominant objective of the Rules Enabling Act: the creation of a uniform and "simplified practice [that would] strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances."[34]

Because procedural law should be uniform and predictable, this Court should not interpret a Federal Rule to mean different things under different statutes unless such an interpretation is required by a substantive legal rule.

* * *

For these reasons, the policies of comity, federalism, and finality mentioned by the Eleventh Circuit do not repeal the civil pleading rules by implication. This Court need not delve any deeper into policy to hold that the district court erred by dismissing Day's petition *sua sponte* based on a limitations defense that the State not only failed to plead but expressly conceded. Yet a full examination of relevant policy concerns provides further support for that holding. Concerns such as judicial neutrality, the adversary character of our legal system, procedural efficiency and certainty, and the importance

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[34] Hughes, C.J., *Address before the American Law Institute* (May 9, 1935), *reprinted in* 21 A.B.A.J. 340, 341 (1935); see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1023-24 & 1024 n.36 (1982); Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules*, 15 Tenn. L. Rev. 551, 558-62 (1939).

of the habeas remedy weigh heavily against the district court's decision to aid the State at Day's expense by imposing the State's waived limitations defense *sua sponte*. In addition, holding the State executive branch to its waiver would not offend comity, federalism, or finality.

B. Policy Concerns Counsel Against Post-Answer *Sua Sponte* Dismissal.

The State argues that confining the district court's summary dismissal power to the pre-answer time frame of Habeas Rule 4 elevates form over substance. Opp. 5. To the contrary, several important policies counsel against dismissing a case *sua sponte* based on limitations after a litigant foregoes the opportunity to raise that defense in its answer.

1. Perhaps most important is the principle that the Due Process Clause and Article III require a "neutral and detached judge." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 533 (2004) (quoting *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993)); see also *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986) (Article III guarantees "an independent and impartial adjudication by the federal judiciary"). Judicial neutrality and fairness are compromised when a judge "act[s] as surrogate counsel for one side but not the other." *Bendolph*, 409 F.3d at 172 (Nygaard, J., dissenting). Thus, this Court has held that having judges "advise" *pro se* litigants about how to avoid AEDPA's limitations defense "would undermine district judges' role as impartial decisionmakers." *Pliler* v. *Ford*, 542 U.S. 225, 231 (2004). Impartiality is equally undermined when a judge investigates whether a State litigant has a viable limitations defense that it failed to raise and, if so, dismisses the petition *sua sponte* based on that waived defense.[35] To maintain "both the appearance and

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[35] See *Falconer* v. *Lane*, 905 F.2d 1129, 1135 (7th Cir. 1990) ("[W]aiver is not an obstacle reserved for habeas petitioners alone."); *Davis* v. *Johnson*, 8 F. Supp. 2d 897, 900 (S.D. Tex.

fact of judicial neutrality," *Pliler*'s recognition that judges "may not act as *de facto* counsel in habeas proceedings" should apply with particular force to State litigants already represented by counsel. *Bendolph*, 409 F.3d at 176 (Nygaard, J., dissenting).

2. A judge who imposes a waived limitations defense *sua sponte* also offends the related principle that, "[i]n our adversary system, it is enough for judges to judge." *Dennis* v. *United States*, 384 U.S. 855, 875 (1966). The "adversary system is designed around the premise that the *parties* know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro* v. *United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment) (emphasis added). Thus, "calculating [the AEDPA] statute[] of limitations [is a] task[] normally and properly performed by trained counsel." *Pliler*, 542 U.S. at 231; see *id.* at 232 (noting that these calculations depend upon information more accessible to State than court or petitioner). If counsel fails in his responsibility to calculate the limitations period and to advance an available limitations defense, the fundamental adversary "rule that points [of law] not argued will not be considered" applies. *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring); see *Bendolph*, 409 F.3d at 172 (Nygaard, J., dissenting) ("In an adversar[y] system, it is not for the courts to bring to light the best arguments for either side; that responsibility is left to the parties themselves.").

1998) ("Timing rules work both ways: if the [S]tate wants to kill a man because his filings are not on time, it should raise that issue promptly."); 2 Hertz & Liebman, *supra*, § 22.1, at 933 & n.45, 935 & n.47 (collecting cases that rely on the "equitable imperative to treat litigants on both sides of a lawsuit the same" to conclude that "waiver doctrines [should apply] as strictly against the States * * * as against habeas corpus petitioners").

This adversary doctrine of waiver acknowledges that a party – not the court – is in the best position to know when its own interests are at stake. There are many reasons why a State litigant may choose not to interpose an available limitations defense: because a merits issue offers an easier ground for decision, because it wishes to seize an opportunity for a favorable ruling on an important merits issue, because it wishes to avoid the possibility of making unfavorable law on a limitations issue, or because it concludes in the interest of justice that the petitioner is likely entitled to relief. A State may also conclude that limitations concerns are absent in a particular case because it received adequate notice of the petitioner's claims or because the evidence has not been impaired by the passage of time. See p. 12, *supra*. Given the variety of considerations that must be weighed to decide whether it is in a State litigant's best interest to assert a limitations defense, that decision "can properly and effectively be made *only* by an advocate." *Dennis*, 384 U.S. at 875 (emphasis added). "Accordingly, when * * * the [S]tate waives a [defense] * * *, the district court should assume that the waiver is justified." *Esslinger* v. *Davis*, 44 F.3d 1515, 1528 (11th Cir. 1995).

3. Post-answer dismissal based on a waived limitations defense also fails to advance – and in fact undermines – values of procedural efficiency and judicial economy. As explained in Part I.A. above, a primary purpose of the limitations defense is to relieve the court of the burden of trying stale claims by allowing it to dispose of such claims promptly. Thus, requiring the State to raise an affirmative defense of limitations early in the litigation conserves judicial resources. If the State fails to raise its defense in a timely manner, however, "the parties and the court begin to expend time and effort on the merits of the petition." *Bendolph*, 409 F.3d at 173 (Nygaard, J., dissenting). Here, the magistrate judge issued his show-cause order regarding limitations nearly a year after Day's petition was filed and eight months

after the parties completed full briefing on the merits of the petition. "At this point, judicial efficiency and economy [were] already lost." *Ibid.*

Moreover, even if curing a State's waiver of limitations through *sua sponte* dismissal could save resources in a particular case, that practice would harm the efficiency of the judicial system overall. Rescuing the State from its waiver dramatically undermines its incentive to comply with the resource-conserving procedures that require parties to raise defenses early. See Part I.A., *supra*. It also permits the State to "sandbag" the petitioner and consume the court's resources by "seek[ing] a favorable ruling on the merits in the district court while holding the * * * [limitations] defense in reserve for use on appeal if necessary." *Granberry*, 481 U.S. at 132.

In addition, making it a court's business to ferret out a party's waived defenses would waste more judicial resources on an issue collateral to the merits with little resulting benefit. This Court is understandably reluctant to have district judges undertake "the potentially burdensome, time-consuming, and fact-intensive task of making a case-specific investigation and calculation of whether the AEDPA limitations period has already run." *Pliler*, 542 U.S. at 232. Furthermore, because "district judges often will not be able to make these calculations based solely on the face of habeas petitions," it is quite possible that they will "err in their calculation" (*ibid.*) and expend everyone's resources pointlessly.

4. Values of certainty and equality in the application of procedural rules would also suffer if courts were given unfettered discretion to dismiss a petition *sua sponte* based on a waived limitations defense. None of the courts below recognized any limits on their ability to impose the defense *sua sponte* or conducted any analysis of whether that step was appropriate in this case. The Eleventh Circuit and the State attempt to avoid this problem by arguing that courts have "an *obligation* to enforce the [AEDPA] statute of limitations."

Pet. App. 5a (emphasis added); see Opp. 7. Yet this Court has rejected that argument with respect to another non-jurisdictional habeas defense (procedural default), holding that a court "is not 'required' to raise the issue * * * *sua sponte*." *Trest*, 522 U.S. at 89.

Thus, the holdings below simply allow courts to cure a State's waiver at their whim. That approach not only introduces uncertainty about whether generally-applicable waiver rules will be enforced in a given case, it is also "likely to create vast disparities concerning the treatment of government waiver between judges and from one case to the next" that produce different outcomes for similarly situated petitioners. *Bendolph*, 409 F.3d at 175 n.27 (Nygaard, J., dissenting). "[T]he harm caused by the failure to treat similarly situated [petitioners] alike cannot be exaggerated: such inequitable treatment hardly comports with the ideal of administration of justice with an even hand." *Teague*, 489 U.S. at 315 (plurality opinion of O'Connor, J.) (internal quotation marks omitted); see also *Lonchar*, 517 U.S. at 323-24 (noting importance of laying down specific standards for habeas procedure to "reduce uncertainty" and "minimize disparate treatment of similar cases").

5. Finally, dismissing a petition *sua sponte* based on a waived defense is contrary to this Court's admonition that habeas corpus is "not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes." *Hensley* v. *Mun. Ct.*, 411 U.S. 345, 349 (1973) (internal quotations marks and citation omitted). Dismissing Day's *first* federal habeas petition on this basis was especially improper, "for that dismissal denies [him] the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar*, 517 U.S. at 324. This Court should not grant State litigants in habeas cases a special exemption from the ordinary rules governing waiver and *sua sponte* dismissal.

C. Waiver Of A Limitations Defense Does Not Offend Comity, Federalism, Or Finality.

Disregarding the policies discussed above, the Eleventh and Third Circuits have held that a post-answer *sua sponte* dismissal based on limitations is proper because it furthers the interests of comity, federalism, and finality underlying AEDPA. Pet. App. 5a-6a; *Bendolph*, 409 F.3d at 162, 165. The State argues that comity, in particular, gives courts discretion to impose waived defenses. Opp. 8-9. A closer examination of these interests, however, reveals that none is offended by holding a State litigant to its waiver.

1. AEDPA's limitations defense "do[es] not implicate the interests of comity and federalism." *Bendolph*, 409 F.3d at 173 (Nygaard, J., dissenting). In the habeas context, comity and federalism "dictate[] that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the *state courts* should have the first opportunity to review this claim and provide any necessary relief." *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 844 (1999) (emphasis added). This rationale supported the creation of common-law exhaustion and procedural default defenses, which ensure that state courts are given this opportunity and that their procedural requirements for review are respected.[36] Because the proper relationship between federal and state courts is not solely the concern of the parties, this Court has held that it may be appropriate for a federal appellate court to dismiss in

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[36] *Coleman* v. *Thompson*, 501 U.S. 722, 730-32 (1991); see also *Rose* v. *Lundy*, 455 U.S. 509, 515 (1982) (explaining that Court developed common-law exhaustion requirement to avoid "unnecessary conflict" in relations "between the judicial tribunals of the Union and of the States" (quoting *Ex parte Royall*, 117 U.S. 241, 251 (1886)).

favor of state court review even when an exhaustion defense is raised belatedly on appeal.[37]

Policies such as comity and federalism did not give rise to a common-law defense of limitations in habeas corpus cases, however. Limitations was never part of habeas corpus practice until Congress enacted a one-year statute of limitations in AEDPA. *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993). Because this new limitations period is exclusively a creature of Congress, it should be interpreted according to Congress's intent – not the common-law policies that are the framework for some other habeas defenses.

Moreover, unlike the exhaustion and procedural default defenses, AEDPA's statutory limitations defense is not a mechanism for deference to state courts and their procedures. Instead, it cuts off federal review altogether based on a timing rule that state courts never consider. The State's only involvement with the federal limitations defense is as a party: its executive branch represents the official with custody of the petitioner. If the State as litigant does not "indicate that a federal constitutional claim is barred," however, "a federal court implies no disrespect for the State by entertaining the claim." *Ulster County Ct.* v. *Allen*, 442 U.S. 140, 154 (1979).

In fact, as discussed in Part III.B.2. above, a State litigant is in a far better position than a court to decide whether asserting a limitations defense is in its best interest. Given the many reasons why a State might choose not to invoke a limitations defense, it would undermine interests of comity and federalism for a court to subvert the State's choice by imposing that defense *sua sponte*.

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[37] *Granberry*, 481 U.S. at 134 ("The court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim.").

In the district court, the State affirmatively conceded that Day's petition was timely and then said nothing when the magistrate judge issued his *sua sponte* show-cause order regarding limitations. It never advocated a dismissal based on limitations at any time. Thus, comity and federalism do not support the district court's order dismissing Day's petition.

2. With respect to finality, this Court has held that "Congress enacted AEDPA to reduce delays in the execution of state * * * sentences, particularly in capital cases." *Woodford*, 538 U.S. at 206. In particular, AEDPA's limitations period "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan*, 533 U.S. at 179; see also *Rhines* v. *Weber*, 125 S. Ct. 1528, 1534 (2005).

Existing procedures are sufficient to accommodate this goal of not delaying finality. *Scott*, 286 F.3d at 930 n.10. Before an answer is filed, Habeas Rule 4 allows courts to dismiss untimely petitions summarily. If the court orders the State to answer an untimely petition, the State can obtain a prompt dismissal through the adversary process by raising the limitations defense in its answer.

There is no reason to go further by creating an ad hoc exception to the Civil Rules concerning waiver and post-answer *sua sponte* dismissal. Giving a trial or appellate court discretion to dismiss a petition *sua sponte* based on limitations at later stages of the litigation – here, nearly a year after the petition was filed – would not reduce delay. In addition, the lingering uncertainty of possible *sua sponte* action leaves both parties in limbo; it certainly does not provide the State with the "real finality" necessary to execute its moral judgment and allow the victims of crime to move forward. *Calderon* v. *Thompson*, 523 U.S. 538, 556 (1998).

Moreover, the State's interest in finality is not absolute in the habeas context.[38] AEDPA's limitations period itself contains exceptions for tolling, retroactivity, and equitable impediments to filing. 28 U.S.C. § 2244(d). In addition, this Court's recent decisions in *Gonzalez* and *Mayle* confirm that finality is not offended when a generally-applicable Civil Rule provides an exception to the limitations period. See Part II.B.3., *supra*. As in *Gonzalez*, "the virtues of finality" carry "little weight" here because the whole purpose of Civil Rules 8(c) and 12(b) is to require that limitations and other defenses be raised promptly on pain of waiver – *i.e.*, to make an exception to finality in order to promote judicial efficiency. 125 S. Ct. at 2646; see Part I.A., *supra*. The policy balance struck by these rules should be respected.

Finally, as with AEDPA, an interest in finality also motivated the enactment of limitations periods in civil cases generally. See *McCuskey* v. *Cent. Trailer Servs., Ltd.*, 37 F.3d 1329, 1333 (8th Cir. 1994). Indeed, the policy reasons for having a limitations period are stronger in ordinary civil cases than in non-capital habeas cases like this one.[39] Yet courts in these civil cases readily find a limitations defense

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[38] *McCleskey*, 499 U.S. at 492-93; see also *Bendolph*, 409 F.3d at 174 (Nygaard, J., dissenting) (noting that "conventional notions of finality have diminished significance in the context of habeas").

[39] Several of the policies underlying a typical statute of limitations – such as preventing the assertion of stale claims, ensuring notice of adverse claims and protecting settled expectations against an impaired fact-finding process (see Part I.A., *supra*) – have diminished significance in non-capital habeas cases. See 28 U.S.C. §§ 2254(b) (requiring prior exhaustion of claims in state court), 2254(e) (presuming that state court factual determinations are correct); *Rose*, 455 U.S. at 520 (noting that non-capital "prisoner's principal interest, of course, is in obtaining speedy relief on his claims"). AEDPA includes a separate limitations period for capital prisoners that is not at issue here. See 28 U.S.C. § 2263.

waived and refuse to impose it *sua sponte*. See Part I.A.-B., *supra*. The result should be no different here.

IV. THE STATE EXPRESSLY AND CORRECTLY CONCEDED THE PETITION WAS TIMELY.

A. The District Court Erred By Failing To Give Binding Effect To The State's Express Waiver.

The State also waived the limitations defense for a second, independent reason: it expressly conceded in its answer that Day's petition was timely. J.A. 24 ("Respondent agrees the petition is timely; filed after 352 days of untolled time."). The district court erred by ignoring this concession and addressing the timeliness of Day's petition *sua sponte*.

The State's pleading that "the petition is timely" was an express waiver of its limitations defense that should have been given binding effect. In a similar case involving the exhaustion defense, the Eighth Circuit held "that when * * * the [S]tate unequivocally concedes in pleadings that a petitioner's claims * * * have been exhausted, that concession constitutes an express waiver." *Purnell* v. *Mo. Dep't of Corr.*, 753 F.2d 703, 708 (8th Cir. 1985); see also *Esslinger*, 44 F.3d at 1520, 1525 (answer representing that petitioner "has not procedurally defaulted on any of his claims" constituted waiver); *cf. Green* v. *United States*, 260 F.3d 78, 84-85 (2d Cir. 2001) (holding that government expressly waived limitations defense by making statements in brief inconsistent with defense).

The State attempts to blunt the force of this waiver by arguing that it was based on a calculation "mistake." Opp. 2. Yet "the consequences of a pleading may not be avoided merely by stating in conclusory fashion * * * that the concession was 'clearly inadvertent' or by claiming * * * that 'a big mistake' had been made." *Purnell*, 753 F.2d at 708 (citing Fed. R. Civ. P. 11). Instead, "when * * * the [S]tate waives a [defense] * * *, the district court should assume that the

waiver is justified." *Esslinger*, 44 F.3d at 1528. Accordingly, the district court erred in addressing the timeliness of Day's petition after the State had conceded that it was timely. See *id.* at 1527 n.44 (holding that "district court abused its discretion in not honoring the Attorney General's waiver" of procedural default defense); *Purnell*, 753 F.2d at 710 (remanding "with instructions that the district court accept the state's waiver of exhaustion and consider the habeas corpus petition on its merits").

B. The State's Express Concession Of Timeliness Was Correct.

The court of appeals attempted to avoid this conclusion by labeling the State's concession of timeliness "patently erroneous." Pet. App. 4a. In fact, however, Day's petition was timely. For this additional reason, the State's express waiver should have been given binding effect.

The timeliness of Day's federal petition turns on whether the tolling period for his Florida post-conviction application included the 90 days during which he was eligible to file a certiorari petition with this Court (the "post-conviction certiorari period"). Pet. App. 16a (timeline). In 28 U.S.C. § 2244(d)(2), Congress provided that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is *pending* shall not be counted toward any period of limitation under this subsection." (Emphasis added). The plain meaning of "pending," together with AEDPA's statutory structure, indicates that the federal limitations period continued to be tolled during the post-conviction certiorari period. See *Abela* v. *Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc), cert. denied sub nom. *Caruso* v. *Abela*, 541 U.S. 1070 (2004).

1. Section 2244(d)(2) tolls limitations during the post-conviction certiorari period based on the plain meaning of "pending."

In *Carey* v. *Saffold*, 536 U.S. 214, 219 (2002), this Court held that a state post-conviction application remains "pending" for § 2244(d)(2) tolling purposes beyond the time period when the application is actually "under court consideration." The Court looked to plain meaning, observing that "'[t]he dictionary defines 'pending' (when used as an adjective) as 'in continuance' or 'not yet decided.' * * * It similarly defines the term (when used as a preposition) as 'through the period of continuance * * * of,' 'until the * * * completion of.'" *Id.* at 219-20 (quoting Webster's Third New International Dictionary 1669 (1993)). Accordingly, the Court held that tolling under § 2244(d)(2) continues "until the completion of" the "collateral review process" – that is, until the petitioner's state post-conviction "application has achieved final resolution." *Id.* at 214.[40] In the AEDPA context, then, an application for state post-conviction relief remains "pending" until it becomes "final." *Abela*, 348 F.3d at 172 (holding these words are "but two sides of the same coin").

This Court recently defined the term "final" for limitations purposes in *Clay* v. *United States*, 537 U.S. 522 (2003). *Clay* considered when a federal conviction becomes "final" on direct review, which is when the one-year limitations period for § 2255 motions by federal prisoners begins to run. It held that in "post-conviction relief, a context in which finality has a long-recognized, clear meaning[,] [f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, *or when the time for filing a certiorari petition expires*" without a petition being filed. *Id.* at 527 (emphasis added).

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[40] Although *Carey* refers to completion of the "State's post-conviction procedures," 536 U.S. at 220, no federal certiorari petition on the application for state collateral review was at issue.

Because a state court's ruling on a state post-conviction application is subject to alteration by this Court until the time for seeking certiorari review expires, that ruling similarly is not "final" until the post-conviction certiorari period expires. The application thus remains "pending" during that period – and the limitations period continues to be tolled under § 2244(d)(2) – regardless of whether certiorari is sought. *Abela*, 348 F.3d at 172-73.

Here, Day used 353 days of the one-year limitations period before filing his state post-conviction application, but the tolling period for that application did not end until after he filed his federal petition. Pet. App. 16a; see p. 4-5, *supra*. Accordingly, his federal petition was timely.

2. AEDPA's structure confirms that the post-conviction certiorari period tolls limitations.

The conclusion that § 2244(d)(2) tolls limitations during the post-conviction certiorari period is confirmed by comparing it with 28 U.S.C. § 2263, the limitations and tolling provision for capital prisoners in opt-in states. Section 2263 reflects the language Congress used when it intended to *exclude* from tolling the post-conviction certiorari period.[41]

Under § 2263(a), the limitations period begins on the date of "final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review." This period is then tolled by § 2263(b)(1) "from the date that a petition for certiorari *is filed* in the Supreme Court until the date of final disposition of the petition * * *." (Emphasis added). By its plain terms, § 2263(b)(1)

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[41] Section 2263 was intended to limit the ability of capital claimants to delay executions by filing eleventh-hour certiorari petitions. See 135 Cong. Rec. 24,684 (1989) (statement of Sen. Biden).

requires that a capital opt-in prisoner actually file a certiorari petition to get the benefit of any tolling after the last state court decision. No such requirement appears in § 2244(d)(2).

Subsection 2263(b)(2) also tolls the limitations period "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final *State court* disposition of such petition." (Emphasis added). In contrast, § 2244(d)(2) does not limit tolling to the time that a post-conviction application is pending in the state court system.

Thus, in § 2263, Congress intentionally excluded the certiorari period from two parts of the tolling scheme. Congress's decision not to use either method of exclusion in § 2244 confirms that the 90-day period for seeking certiorari from this federal court does toll limitations regardless of whether a petition is filed. *Russello*, 464 U.S. at 23 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Some courts have reached the opposite conclusion by comparing § 2244(d)(2) with § 2244(d)(1)(A).[42] The latter section provides that limitations begins to run after the latest of, among other things, the day a judgment "bec[omes] final by the conclusion of direct review or the expiration of the time for seeking such review." According to these courts, "pending" should not include the post-conviction certiorari period because § 2244(d)(2) does not expressly mention the expiration of the time for seeking certiorari.

To apply the *Russello* presumption to those two provisions, however, there must be some basis to assume Congress

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[42] See, *e.g.*, *Coates* v. *Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000) (per curiam); *Stokes* v. *Dist. Attorney of Philadelphia County*, 247 F.3d 539, 541 (3d Cir. 2001) (collecting cases).

varied the statutory wording to contrast each provision with the other. That notion is unreasonable because it compares apples to oranges: § 2244(d)(1)(A) establishes a date for starting the limitations period (a "trigger" provision), while § 2244(d)(2) establishes the interval during which that period is tolled. The language of these provisions is necessarily different because they refer to different temporal phenomena: § 2244(d)(1) uses "final" to identify a *discrete* point in time (to trigger the limitations period); § 2244(d)(2) uses "pending" to identify a time *interval* (to toll that period). Thus, specifying the "expiration of the time for seeking such review" as a point when the judgment becomes "final" does not negate the conclusion that the case remains "pending" during the time interval for seeking such review.

In sum, applying the *Russello* presumption to interpret § 2244(d)(2) in light of § 2244(d)(1)(A) is inappropriate because the differences between these provisions result from a need to identify different temporal phenomena, not from a need to distinguish between direct and post-conviction treatment of certiorari periods. Moreover, AEDPA's legislative history shows that the wording of § 2244(d)(1)(A) resulted not from an intent to make such a distinction, but from a desire to separate the limitations trigger from the exhaustion requirement. See *Kapral* v. *United States*, 166 F.3d 565, 581 (3d Cir. 1999) (Alito, J., concurring) (explaining that § 2244(d)(1)(A)'s text is merely a "product of the vagaries of the legislative process" and distinguishing trigger provisions of § 2244(d)(1)(A) from those in § 2255 ¶ 6(1)).[43]

Accordingly, the apples to apples comparison is between the two tolling provisions discussed above: § 2263(b) and

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[43] In *Clay*, this Court expressly declined to use the *Russello* canon to interpret § 2255 ¶ 6(1) in light of § 2244(d)(1)(A) for some of the same textual and legislative reasons identified above. See *Clay*, 537 U.S. at 530 (inferring instead a textual basis for the varied phrasing of § 2244(d)(1)(A) and § 2255 ¶ 6(1)).

§ 2244(d)(2).[44] Because that comparison confirms that § 2244(d)(2) tolls limitations during the post-conviction certiorari period, Day's petition was timely and the district court erred by failing to honor the State's express concession of timeliness.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted.

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[44] See *White* v. *Klitzkie*, 281 F.3d 920, 927 (9th Cir. 2002) (Berzon, J., dissenting); 1 Hertz & Liebman, *supra*, § 5.2b at 252-53 n.50.

United States Code

28 U.S.C. § 2244(d): (excerpts)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. This limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

* * * * *

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2263: (excerpts)

Filing of habeas corpus application; time requirements; tolling rules

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of

last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition;

* * *

Federal Rules of Civil Procedure ("Civil Rules")

Civil Rule 8(c):

Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Civil Rule 12(b):

How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is

waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Civil Rule 12(h):

Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Civil Rule 81(a)(2):

These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent

that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

Rules Governing Section 2254 Cases ("Habeas Rules")

Habeas Rule 4 (as amended December 1, 2004):

Preliminary Review; Serving the Petition and Order

The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

Former Habeas Rule 4:

Preliminary Consideration by Judge

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appro-

priate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

Habeas Rule 5 (as Amended December 1, 2004):

The Answer and the Reply

(a) *When Required.* The respondent is not required to answer the petition unless a judge so orders.

(b) *Contents: Addressing the Allegations; Stating a Bar.* The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.

(c) *Contents: Transcripts.* The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished. If a transcript cannot be obtained,the respondent may submit a narrative summary of the evidence.

(d) *Contents: Briefs on Appeal and Opinions.* The respondent must also file with the answer a copy of:

(1) any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding;

(2) any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and

(3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence.

(e) *Reply.* The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

Former Habeas Rule 5:

Answer; Contents

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

Habeas Rule 11:

Applicability of the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

S. Court, U.S.
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No. 04-1324

In The
Supreme Court of the United States
October Term, 2005

PATRICK A. DAY,
Petitioner,

v.

JAMES V. CROSBY, JR., Secretary,
Florida Department of Corrections,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

(COMBINED AND RESTATED)

Whether a district court has discretion to dismiss a habeas petition as untimely despite a State's waiver, inadvertent or otherwise, if the district court gives the parties notice and an opportunity to be heard and considers whether a *sua sponte* dismissal would prejudice the petitioner?

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STATEMENT OF THE CASE

A Florida jury convicted Day of second degree murder, and he was sentenced by a Florida trial court. The Florida First District Court of Appeal ("First District") affirmed Day's sentence on December 21, 1999. (J.A. 1, 3). Day did not petition this Court for review of that decision, but his deadline for doing so was March 20, 2000. *See* Supreme Court Rule 13.1.

Three hundred and fifty-three (353) days later, on March 13, 2001, Day filed a motion for state post-conviction relief. (J.A. 2). That motion and a second post-conviction motion were both denied. (J.A. 2). The First District affirmed and issued its mandate on December 3, 2002. (J.A. 4).

Thirty-six (36) days later, on January 8, 2003, Day filed the petition for federal habeas relief that is the subject of this appeal. (J.A. 5). The assigned magistrate judge ordered the State to answer. (J.A. 21). Respondent's answer erroneously concluded that the petition had been "filed after 352 days of untolled time" and was therefore "timely," even though the answer and its attachments revealed that more than one year of untolled time had passed between the finality of Day's conviction and the filing of his habeas petition. (J.A. 23-24; Dkt. 7, Exs. G, I, P (Exhibits to Respondent's Answer)). Upon order of the court, Day filed a reply to Respondent's answer. (Dkts. 8, 9).

No further activity occurred in the case until December 2003, when a newly assigned magistrate judge ordered Day to show cause why the petition should not be dismissed as untimely. (J.A. 26-30). Day's response noted Respondent agreed the petition was timely, and contended his petition was in fact timely because the limitations period in 28 U.S.C. § 2244(d) was tolled during the time when he could have sought certiorari from the First District's denial of post-conviction relief. (J.A. 31-32). He also raised brief arguments relating to equitable tolling. (J.A.

32). The magistrate judge recommended dismissal, concluding Day's argument that his petition was timely was foreclosed by controlling Eleventh Circuit precedent and his equitable tolling claim was deficient. (Petition for Cert. App. C at 8a-15a). Day filed an objection, asserting that the district court's power to dismiss a plainly deficient habeas petition expired when the court ordered the respondent to file an answer. (J.A. 35). The district court adopted the magistrate judge's report and recommendation and dismissed the petition. (J.A. 7).

The Eleventh Circuit granted Day a certificate of appealability to address "[w]hether the district court erred in addressing the timeliness of appellant's habeas corpus petition . . . after Respondent had conceded that [Day's] petition was timely." (J.A. 37). The court affirmed, holding that "a concession of timeliness that is patently erroneous does not compromise the authority of a district court to dismiss *sua sponte* a habeas petition that is untimely, under AEDPA, which was enacted to promote finality of state criminal judgments." *Day v. Crosby*, 391 F.3d 1192, 1192 (11th Cir. 2004). This Court granted certiorari. *Day v. Crosby*, 126 S. Ct. 34 (2005).

SUMMARY OF ARGUMENT

A district court has authority to raise the AEDPA limitations defense *sua sponte* nothwithstanding a State's waiver, and to dismiss an untimely petition after having given notice and determined that the petitioner is not prejudiced by the *sua sponte* dismissal. While Respondent acknowledges the limitations defense may be waived, that waiver, inadvertent or otherwise, is not alone dispositive of the court's inherent authority. Rather, the district court must exercise discretion in each case to decide whether the administration of justice is better served by dismissing the case on limitations grounds or by reaching the merits of the petition.

Habeas cases differ from ordinary civil cases because habeas cases implicate interests of comity, federalism, and finality --- interests beyond those of the parties. Recognizing this distinction, this Court and the lower courts have held that federal habeas courts have inherent authority to raise other potential non-jurisdictional bars to habeas relief even where the government has not properly raised such defenses. AEDPA's limitations defense implicates these same interests and promotes judicial efficiency and conservation of judicial resources. Therefore, federal courts may raise the limitations defense *sua sponte* just as they may raise the more traditional habeas defenses *sua sponte*. The exercise of inherent authority to dismiss untimely petitions is consistent with both the letter and spirit of the Habeas Rules and with this Court's habeas jurisprudence.

Waiver of the limitations defense is a factor to be considered by the court in determining whether to raise the defense *sua sponte*. Indeed the intentional relinquishment of the defense would weigh against *sua sponte* dismissal. However in this case, the district court was correct to raise the limitations defense *sua sponte* because applicability of the defense was apparent from the entirety of Respondent's answer.

Day was given appropriate notice and the opportunity to be heard before his untimely petition was dismissed, and is not prejudiced by the dismissal. A frustrated expectation of receiving a decision on the merits does not constitute prejudice. Further, there is no suggestion Respondent "strategically" withheld the defense, and the possibility that a State might do so in another case is not a sound basis for denying courts the authority to consider timeliness *sua sponte* in all cases. Additionally, the fact that statute of limitations calculations in habeas cases are prone to error counsels in favor of district court discretion. The effectuation of AEDPA's purposes should not depend solely on the ability of one government attorney to calculate the limitations period correctly in a given case.

Finally, Day's contention his petition was timely is not fairly included within the certiorari petition and in fact would obviate the need to address the issues upon which the Court granted certiorari. Additionally, Day's contention his petition was timely can only be correct if his state postconviction motion remains "pending" under 28 U.S.C. § 2244(d)(2) during the period when he could have, but did not, petition this Court for a writ of certiorari. This construction of § 2244(d)(2) is inconsistent with this Court's decision in *Carey v. Saffold*, 536 U.S. 214 (2002), and has been rejected by all but one of the eleven circuits to have considered the issue. Thus even if the Court reaches this issue, it should reject Day's argument and approve the view of the overwhelming majority of the circuits.

ARGUMENT

I. A DISTRICT COURT HAS DISCRETION TO RAISE THE LIMITATIONS DEFENSE *SUA SPONTE*

Respondent of course acknowledges the statute of limitations defense in a habeas proceeding may be waived. Every circuit court of appeal to consider the issue has held the limitations defense is not jurisdictional and is thus subject to equitable considerations such as waiver. *E.g.*, *Robinson v. Johnson*, 313 F.3d 128, 134, 141 (3d Cir. 2002), *cert. denied*, 540 U.S. 826 (2003); *Acosta v. Artuz*, 221 F.3d 117, 122 (2d Cir. 2000). However, the effect of a State's waiver in any given case presents a question subsumed by the central issue presented in this case—whether a federal court has discretion to dismiss an untimely habeas petition notwithstanding the State's waiver of the statute of limitations defense. As developed below, a State's waiver of the limitations defense in a § 2254 case, inadvertent or otherwise, is not alone dispositive. Waiver is simply one factor for the district court to consider in deciding whether to exercise its *sua sponte* discretion to raise the limitations defense and, after notice and absent prejudice, ultimately to dismiss on that basis.

A. Habeas proceedings implicate interests beyond those of the parties.

The exercise of habeas jurisdiction exacts "profound societal costs." *Smith v. Murray*, 477 U.S. 527, 539 (1986), *quoted in Calderon v. Thompson*, 523 U.S. 538, 554 (1998). Among the heaviest costs of habeas review is the frustration of "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 128 (1982), *quoted in, e.g.*, *Calderon*, 523 U.S. at 555-56, *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993), and *McCleskey v. Zant*, 499 U.S. 46, 491 (1991). This Court has recognized repeatedly the States' significant interest in the

finality of convictions that have survived direct review within the state courts. *Brecht*, 507 U.S. at 635; *Bell v. Thompson*, 125 S. Ct. 2825, 2837 (2005); *Calderon*, 523 U.S. at 555. "Finality is essential to both the retributive and deterrent functions of the criminal law." *E.g.*, *Calderon*, 523 U.S. at 555. "Neither innocence nor just punishment can be vindicated until the final judgment is known," *McCleskey*, 499 U.S. at 491, and "[w]ithout finality, the criminal law is deprived of much of its deterrent effect," *id.* (quoting *Teague v. Lane*, 489 U.S. 288, 309 (1989)).

Lack of finality has heightened significance in the context of habeas petitions filed under 28 U.S.C. § 2254 because such petitions implicate comity and federalism concerns. *See McCleskey*, 499 U.S. at 491; *Engle*, 456 U.S. at 134. "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them." *McClesky*, 499 U.S. at 491, *quoted in Calderon*, 523 U.S. at 556. The Court has recognized that liberal allowance of habeas diminishes the significance of state trial court proceedings, *see, e.g.*, *id.* at 635, *Engle*, 456 U.S. at 127, encourages petitioners to relitigate claims on collateral review, *Brecht*, 507 U.S. at 635, and even arguably erodes the quality of state court judging and the morale of state judiciaries, *see Calderon*, 523 U.S. at 555 ("There is perhaps nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.") (internal quotation omitted); *Engle*, 456 U.S. at 128 n.33. Thus, "[i]ndiscriminate federal intrusions may simply diminish the fervor of state judges to root out constitutional errors on their own." *Id.*

Congress sought to promote the core interests of comity, federalism, and finality by enacting The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See, e.g.*,

Woodford v. Garceau, 538 U.S. 202, 206 (2003) (recognizing that Congress enacted AEDPA to reduce delays in the execution of criminal sentences and "to further the principles of comity, finality, and federalism") (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)); *see also Mayle v. Felix*, 125 S. Ct. 2562, 2573 (2005) ("Congress enacted AEDPA to advance the finality of criminal convictions."). Even in cases where the specific terms of AEDPA do not address the precise question at issue, federal courts must act consistently with the specific objects of AEDPA and the general principles underlying this Court's habeas jurisprudence. *Calderon*, 523 U.S. at 554 ("Although the terms of AEDPA do not govern this case, a court of appeals must exercise its discretion [to *sua sponte* recall its mandate] in a manner consistent with the objects of the statute."). Therefore, any exercise of discretion in a § 2254 case must be carried out with these objects in mind.

Day discounts the fundamental distinction between habeas and ordinary civil cases arguing that the interests of comity, federalism, and finality have no impact on the outcome of this case. After all, Day asserts, "Congress did not enact 'comity, federalism, and finality;' it enacted AEDPA." (Pet. Brief 31). But Day's position ignores this Court's consistent instruction that courts must exercise their discretion in determining whether granting the writ in a particular case is consistent with the overarching habeas principles of comity, federalism, and finality. This discretion is embodied in the courts' long recognized authority to raise *sua sponte* defenses to habeas relief including exhaustion, procedural default, nonretroactivity, and abuse of the writ—even when the State has failed to raise such defenses—because of the societal costs that attend the federal courts' exercise of habeas jurisdiction. Like these traditional habeas defenses, AEDPA's statute of limitations defense implicates concerns beyond those of the individual litigants in a particular proceeding. Each of these defenses exists to safeguard the finality of judgments and respect for state sovereignty.

Therefore, it is a proper exercise of judicial discretion for a federal court to raise habeas defenses *sua sponte* when doing so is consistent with these principles.

B. Courts have discretion to raise procedural bars to habeas relief *sua sponte*.

A State's answer to a habeas petition must state whether any claim in the petition is barred by "a failure to exhaust remedies, a procedural bar, non-retroactivity, or a statute of limitations." Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts (2005).[1] None of these bars is jurisdictional. *E.g.*, *Granberry v. Greer*, 481 U.S. 129, 131 (1987) (exhaustion not jurisdictional); *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) (procedural default bar not jurisdictional); *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (nonretroactivity principle not jurisdictional); *Robinson*, 313 F.3d at 134 (limitations not jurisdictional). Nevertheless, this Court and the circuit courts have held repeatedly that even when one of these potential bars is not properly raised by the State, the federal courts have discretion to raise the issue. *Long v. Wilson*, 393 F.3d 390, 403 (3d Cir. 2004) ("It is now widely recognized that judges have discretion to raise procedural defenses in habeas cases."). This is because the interests advanced by these defenses, comity, federalism, and finality, are institutional interests that extend beyond the interests of the litigants in any particular case.[2]

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[1] Respondent cites the current version of the rule even though it contains amendments made after pleading was complete in the present case because the amendments were intended to be stylistic only and not substantive. *See* Rule 5, Rules Governing Section 2254 Cases, Notes of Advisory Committee on 2004 amendments.

[2] Day relies heavily on *Scott v. Collins*, 286 F.3d 923 (6th Cir. 2002) and *Nardi v. Stewart*, 354 F.3d 1134 (9th Cir. 2004). However, neither case even mentions *Granberry v. Greer*, 481 U.S. 129 (1987),

1. Failure to Exhaust

Absent exceptional circumstances, a federal court will not consider a habeas petition until the petitioner has exhausted his state remedies. 28 U.S.C. § 2254(b)(3); *e.g.*, *United States, ex rel Kennedy v. Tyler*, 269 U.S. 13, 17-19 (1925). This doctrine is based on comity: "federal courts . . . will interfere with the administration of justice in the state courts only in rare cases where exceptional circumstances of peculiar urgency are shown to exist." *Ex parte Hawk*, 321 U.S. 114, 117 (1944).

This Court has held that when a State fails to raise an arguably meritorious nonexhaustion defense, it is appropriate for a habeas court to take a "fresh look" at the issue. *Granberry v. Greer*, 481 U.S. 129, 131 (1987).[3] In reaching this conclusion, the Court recognized that although the State has a duty under Habeas Rule 5 to advise the district court whether the prisoner has exhausted all available state remedies, there are exceptional cases in which the State fails to do so. *Id.* The Court acknowledged three possible consequences of the State's failure to raise a potentially viable exhaustion defense: the Court could (1) prohibit dismissal on exhaustion grounds; (2) require dismissal on exhaustion grounds notwithstanding the State's failure to raise the issue; or (3) adopt an intermediate approach

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discussed *infra*, and its progeny, nor any of the procedural default or nonretroactivity cases. Moreover, neither case recognizes the fundamental distinctions between habeas and ordinary civil cases nor AEDPA's avowed congressional purpose of advancing comity, federalism and finality.

[3] As part of AEDPA, § 2254 was amended to provide that a State shall not be deemed to have waived the exhaustion requirement unless the State waives the requirement expressly. 28 U.S.C. § 2254(b)(3). This provision was added in reaction to court decisions that deemed States to have waived the exhaustion requirement where the State did not do so expressly. H.R. Rep. No. 104-23, at 10 (1995). Although *Granberry* predates AEDPA, the force of its reasoning nevertheless applies.

allowing the courts to exercise discretion to determine what resolution best serves the administration of justice in each case. *Id.* at 131. The Court rejected the two "extreme positions," holding that a court "is not required to dismiss for nonexhaustion notwithstanding the State's failure to raise it, and the court is not obligated to regard the State's omission as an absolute waiver of the claim." *Id.* at 133. The Court instead adopted the "middle course," allowing the federal court to determine in each case whether the interests of comity, federalism, and judicial efficiency will be better served by addressing the merits or by requiring additional proceedings in state court. *Id.* at 134, 135.

Thus, even where a State has failed to raise the defense of nonexhaustion, federal courts routinely consider *sua sponte* whether such defense should be applied in a given case in the interests of comity, federalism, and judicial economy. *E.g.*, *Graham v. Johnson*, 94 F.3d 958, 970-71 (5th Cir. 1996); *Smith v. Horn*, 120 F.3d 400, 407-08 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109 (1998).

2. Procedural Default

As a corollary to the exhaustion requirement, a habeas petition may be barred for procedural default if the petitioner failed to raise an alleged constitutional error in state court and is barred from doing so by state procedural rules. *Wainwright v. Sykes*, 433 U.S. 72, 81-87 (1977). Like exhaustion, this rule is grounded in respect for finality, comity, and the orderly administration of justice. *Dretke v. Haley*, 541 U.S. 386, 388 (2004). It is based upon the general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds. *Id.* at 392-93; *Engle*, 456 U.S. at 128-29.

This Court has not squarely addressed the question of whether a court may raise a procedural default defense *sua*

sponte. In *Trest v. Cain*, 522 U.S. 87 (1997), the Court held a court of appeals is not *required* to raise the issue of procedural default *sua sponte* when it has been waived or not raised by the State. *Id.* at 89. The Court expressly declined to address the narrower issue of whether the law *permitted* the circuit court to raise the procedural default issue *sua sponte*, because that issue was not within the scope of the question presented. *Id.*

The circuit courts hold unanimously that *sua sponte* consideration of procedural default is within the court's discretion. *See, e.g., Oakes v. United States*, 400 F.3d 92, 96 (1st Cir. 2005); *Washington v. James*, 996 F.2d 1442, 1448 (2d Cir. 1993), *cert. denied*, 510 U.S. 1078 (1994); *Sweger v. Chesney*, 294 F.3d 506, 520-21 (3d Cir. 2002), *cert. denied*, 538 U.S. 1002 (2003); *Yeatts v. Angelone*, 166 F.3d 255, 261-62 (4th Cir.), *cert. denied*, 526 U.S. 1095 (1999); *Magouirk v. Phillips*, 144 F.3d 348, 358 (5th Cir. 1998); *Sowell v. Bradshaw*, 372 F.3d 821, 830 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 1645 (2005); *Washington v. Lane*, 840 F.2d 443, 446 (7th Cir.), *cert. denied*, 488 U.S. 861 (1988); *King v. Kemna*, 266 F.3d 816, 821 (8th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 934 (2002); *Vang v. Nevada*, 329 F.3d 1069, 1073 (9th Cir. 2003); *Hardiman v. Reynolds*, 971 F.2d 500, 503 (10th Cir. 1992); *Esslinger v. Davis*, 44 F.3d 1515, 1523-29 (11th Cir. 1995). The universal view is that although affirmative defenses ordinarily must be raised by a defendant, the defense of procedural default in habeas proceedings implicates values that transcend the concerns of the parties, i.e., comity, finality, and respect for state judgments. *E.g., Sweger*, 294 F.3d at 520 n.13; *Hardiman*, 971 F.2d at 503. Therefore, it is not exclusively within the parties' control to decide whether such a defense should be raised or waived. *E.g., Sweger*, 294 F.3d at 520 n.13; *see also Oakes*, 400 F.3d at 97 (where "institutional values that transcend the litigants' parochial interests . . . are in play, . . . the court should have some say in deciding whether a defense should be considered or deemed waived").

3. *Nonretroactivity*

A third potential bar to habeas relief, nonretroactivity, prohibits a federal court from granting relief to a state prisoner based on a new constitutional rule of criminal procedure announced after the prisoner's conviction and sentence become final. *Teague v. Lane*, 489 U.S. 288, 310 (1989). This prohibition derives from concerns for finality and evenhanded justice. *Id.* at 300, 309. This Court determined that applying constitutional rules that did not exist when a conviction became final would "seriously undermine[] the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309 (citing *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.")).

This Court instructs that although application of *Teague* is not jurisdictional, it is nevertheless a "threshold question in every habeas case." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Therefore, if the state does not raise a *Teague* defense, a federal court "may, but need not" do so *sua sponte*. *Id.* Federal courts thus raise the nonretroactivity issue regularly. *See, e.g.*, *Webster v. Woodford*, 361 F.3d 522, 526-27 (9th Cir.) (although state waived issue by not presenting it to district court, appellate court exercised discretion to reach issue), *cert. denied sub nom. Webster v. Brown*, 543 U.S. 1007 (2004); *Lewis v. Johnson*, 359 F.3d 646, 654 n.4 (3d Cir. 2004) (exercising discretion to raise *Teague* issue *sua sponte*); *Housel v. Head*, 238 F.3d 1289, 1298 (11th Cir. 2001) (same), *cert. denied*, 534 U.S. 1172 (2002).

4. Abuse of the Writ

A final procedural bar relates to successive habeas petitions. Prior to AEDPA, there was no statutory prohibition against prisoners filing multiple habeas petitions. However, successive petitions were subject to the defense of "abuse of the writ," which allowed for dismissal of second or successive habeas petitions raising grounds not included in the first petition. *See McCleskey*, 499 U.S. at 470; Rule 9(b) of the Rules Governing § 2254 Cases (2004). The abuse of the writ doctrine was designed "to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time . . . and to vindicate the State's interest in the finality of its criminal judgments." *McCleskey*, 499 U.S. at 493. The defense is inapplicable to proceedings governed by AEDPA, as AEDPA prohibits the filing of successive petitions raising new grounds except upon permission from the appropriate circuit court of appeals. 28 U.S.C. § 2244(b)(2),(3).

Those circuit courts that addressed the issue pre-AEDPA held that the abuse of the writ defense could be raised *sua sponte*. *See Femia v. United States*, 47 F.3d 519, 522-23 (2d Cir. 1995); *Sockwell v. Maggio*, 709 F.2d 341, 343-44 (5th Cir. 1983); *Jones v. Estelle*, 692 F.2d 380, 384 n.5 (5th Cir. 1982); *see also Thigpen v. Smith*, 792 F.2d 1507, 1515 (11th Cir. 1986). The Second Circuit explained in *Femia* that dismissal for abuse of the writ is not "within the sole initiative of the prosecution" because abuse of court processes adversely affects the administration of justice to the detriment of the public. 47 F.3d at 522-23. "[W]here a doctrine implicates [nonjurisdictional] values that may transcend the concerns of the parties to an action, it is not inappropriate for the court, on its own motion, to invoke the doctrine." *Id.* (citations and internal quotations omitted).

C. The limitations defense should be treated like other procedural bars to habeas relief.

The question here is whether the federal courts' *sua sponte* authority to raise the defenses of exhaustion, procedural default, nonretroactivity, and formerly, abuse of the writ, similarly applies to the statute of limitations defense. As in *Granberry*, this Court might resolve the question in one of three ways. At one extreme, the position Day urges, the Court might treat the state's failure to raise the defense as an absolute waiver. At the other extreme, the position Day attributes to Respondent, the Court might *require* that a petition be dismissed when the statute of limitations has run. As in *Granberry*, however, neither of these extreme positions is persuasive. The third option, and the one Respondent advocates, is the "intermediate approach" that allows the district court to exercise discretion in each case to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition.

Prior to AEDPA, there was no specific time limitation governing habeas petitions. As a result, state prisoners, particularly those sentenced to death, had incentives to delay filing their habeas petitions. *See, e.g.*, *McCleskey*, 499 U.S. at 491-92; *see also, e.g.*, Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. (BNP) 3239, 3240 (1989) ("litigation of constitutional claims often comes only when prompted by the setting of an execution date."); 142 Cong Rec H3605, H3606 (1996) (statement of Rep. Hyde) (describing then-ubiquitous delays in habeas proceedings in capital cases as "ridiculous"); 142 Cong. Rec. S3454, S3471-72 (1996) (statement of Sen. Specter) (describing delays inherent in the pre-AEDPA habeas statutory scheme).

The purpose of § 2244(d)(1) was to reform and streamline the process, "reduc[ing] the potential for delay on the road to

finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan v. Walker*, 533 U.S. 167, 179 (2001). The limitation period "quite plainly serves the well-recognized interest in the finality of state court judgments," *id.*, and through it, the derivative, equally well-recognized interests in comity and federalism. "The AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000), *quoted in Long v. Wilson*, 393 F.3d 390, 402 (3d Cir. 2004).

Because the statute of limitations furthers the same interests as the other traditional habeas defenses, it is appropriate for federal courts to raise the statute of limitations defense *sua sponte* just as it is appropriate to raise *sua sponte* the defenses of exhaustion, procedural default, nonretroactivity and formerly, abuse of the writ. *Acosta*, 221 F.3d at 117 (like other procedural bars to habeas review, statute of limitations implicates interests of federal courts, state courts, and society and therefore it is appropriate for court to raise statute of limitations on own motion). Indeed, Rule 5 expressly treats the limitations defense exactly like other habeas procedural issues. *See* Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts (2005). *See also Long*, 393 F.3d at 403 (there is "no difference between the habeas corpus statute of limitations and other habeas procedural issues"); *Hill v. Braxton*, 277 F.3d 701, 705 (4th Cir. 2002) (citing procedural default case, *Yeatts v. Angelone*, 166 F.3d 255, 261-62 (4th Cir.), *cert. denied*, 526 U.S. 1095 (1991), for proposition that federal habeas courts may raise affirmative defenses not preserved by state because § 2254 proceedings implicate considerations of comity, federalism, and judicial efficiency to degree not present in ordinary civil actions); *Herbst v. Cook*, 260 F.3d 1039, 1042 (9th Cir. 2001) (just as

district court may raise procedural default *sua sponte*, court may also raise statute of limitations *sua sponte* because interests of comity, federalism, and judicial efficiency underlying court's discretion to raise procedural default apply equally to statute of limitations); *Scott v. Collins*, 286 F.3d 923, 934 (6th Cir. 2002) (Stafford, J., dissenting) (AEDPA's statute of limitations advances similar concerns as doctrines of exhaustion and procedural default, so must be treated the same).

A federal habeas petition filed beyond AEDPA's one year statute of limitations presents the possibility a state court judgment which has survived both direct and collateral state court review will be subjected to extensive federal review in direct contravention of Congress's prohibition on federal habeas review of state judgments that have been final for more than one year. This possibility--that ineligible habeas petitions will usurp limited federal resources and may eventually nullify final judgments entered and upheld by the state courts--raises concerns of comity, federalism and finality that extend far beyond the interests of the individual litigants to any particular habeas proceeding. For this reason, the resolution of untimely habeas petitions cannot be left solely in the hands of the litigants. *See United States v. Bendolph*, 409 F.3d 155, 166 (3d Cir. 2005) (en banc) (expressing doubt that "Congress intended to relegate the efficacy of its reforms to the vagaries of a prosecutor's decisions or mistakes"), *petition for cert. filed*, (U.S. June 24, 2005) (No. 05-3); *Hill v. Braxton*, 277 F.3d 701, 705 (4th Cir. 2002) (because § 2254 actions implicate comity, federalism, and judicial efficiency to degree not present in ordinary civil actions, these interests "eclipse the immediate concerns of the parties" and provide courts discretionary authority to raise affirmative defenses not preserved by state).

Day argues that unlike exhaustion and procedural default, the statute of limitations does not implicate comity and federalism. (Pet. Brief 40-41). To the contrary, this Court's precedent

establishes that federal/state relations are implicated by *any* federal collateral attack on a state court criminal judgment, whether or not such attack directly implicates exhaustion or procedural default. The Court explained this well in *McCleskey*, holding that procedural default and abuse of the writ "implicate nearly identical concerns flowing from the significant costs of federal habeas review." 499 U.S. at 490-91. Although the Court acknowledged that comity and federalism—"respect for the integrity employed by a coordinate jurisdiction within the federal system"—are not implicated directly when a petitioner fails to raise a claim in the first round of federal review, it found both the procedural default and abuse of the writ doctrines are "designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time . . . ." *Id.* at 493; *see also Willams v. Taylor*, 529 U.S. 420, 436 (2000) (Court is careful to limit scope of federal intrusion into state criminal adjudications in order to maintain delicate balance between the States and federal courts); *Engle*, 456 U.S. at 128, 134 (explaining that federal intrusions into state criminal trials frustrate states' sovereign power and noting federal habeas challenges to state convictions implicate special comity concerns). Although comity and federalism may be at their zenith when habeas petitioners have failed to exhaust their constitutional claims in state court, this does not negate the significance of these interests in the context of other habeas defenses.

Further, the potential bars to habeas relief are not solely based on comity; they are also grounded in the closely related and equally important goal of protecting the finality of judgments. *See McCleskey*, 499 U.S. at 493 (doctrines of procedural default and abuse of writ also seek to vindicate State's interest in the finality of its criminal judgments); *Teague*, 489 U.S. at 309 (application of constitutional rules announced after conviction became final seriously undermines principle of

finality which is essential to operation of criminal justice system). Like procedural default, abuse of the writ, and nonretroactivity, the one-year statute of limitations for habeas petitions serves "the well recognized interest" in the finality of judgments. *Duncan*, 533 U.S. at 179.

The fact that habeas petitions were not subject to a statute of limitations before AEDPA does not render inapplicable the body of case law relating to pre-AEDPA defenses. Nothing in AEDPA indicates Congress intended to eliminate the federal courts' well-established discretion to raise defenses not raised by the government when doing so advances the interests of comity, federalism, and finality. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962) (rejecting assertion that civil rule impliedly abrogated courts' inherent authority to dismiss cases *sua sponte* for lack of prosecution because "[i]t would require a much clearer expression of purpose than [the rule] provides us to assume that it was intended to abrogate so well-acknowledged a proposition"). Furthermore, AEDPA restricts the habeas courts' discretion to *grant* relief; it does not eliminate the habeas courts' pre-AEDPA discretion to *deny* relief. *Cf. Horn v. Banks*, 536 U.S. 266, 272 (2002) ("[w]hile it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review . . . none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard"). *See also Bendolph*, 409 F.3d at 155 ("no Congressional intent [in AEDPA] to hamstring the courts in carrying out its reforms"). Thus, the long-recognized authority to raise potential habeas bars *sua sponte* remains intact following AEDPA's enactment, and the effect of AEDPA is merely to add the statute of limitations to the list of defenses federal courts may raise on their own motion when doing so advances the interests underlying AEDPA.

Day relies on *Scott*, 286 F.3d 923, for the proposition that Rule 4 grants a district court authority to raise the limitations

defense *sua sponte* and that authority then expires once the court orders the respondent to file an answer. (Pet. Brief 29). However, Rule 4 is not a grant of authority, but rather a recognition of the district court's well established inherent authority to raise defenses *sua sponte*. The plain language of Rule 4 is devoid of any reference to an elimination of the district court's recognized inherent authority. The text of the rule provides no support for Day's argument that this inherent authority "expires" when the court orders the State to answer. Such an abrogation of the courts' inherent authority must be express, and cannot be accomplished by "negative implication." *See Link*, 370 U.S. at 630.

Day also fails to comprehend the purpose of Rule 4 is to transform the court's recognized authority to deny relief, during the "preliminary review" or pre-answer period, from discretionary to mandatory. *See* Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (2005) (judge "must" dismiss the petition if it plainly appears from petition that petitioner is not entitled to relief); *see also id.*, Notes of Advisory Committee on Rules (it is duty of court to "screen out frivolous applications" and eliminate respondent's burden of filing unnecessary answer). The appropriate negative implication to be drawn from Rule 4 is that once preliminary review is complete and the respondent has been ordered to answer, the court no longer "must" dismiss the petition if it appears the petitioner is not entitled to relief. This reading of Rule 4 is entirely consistent with this Court's holdings that federal courts are not required to raise potential affirmative defenses to habeas actions that the State has failed to raise properly. *See Granberry*, 481 U.S. at 133 (court is not required to dismiss for nonexhaustion notwithstanding State's failure to raise it); *Caspari*, 510 U.S. at 389 (court may, but need not, decline to apply nonretroactivity defense if State does not argue it); *Trest*, 522 U.S. at 89 (court is not required to raise issue of procedural default *sua sponte*). If Day were correct that Rule 4

circumscribes the federal courts' discretion to raise defenses *sua sponte* after the State answers the petition, this interpretation of the rule would effectively overrule the Court's holdings in *Granberry* and *Caspari* that a court may consider the defenses of exhaustion and nonretroactivity even if not properly raised in the respondent's answer.

Nor is a habeas court's inherent authority to consider waived affirmative defenses *sua sponte* diminished by 28 U.S.C. § 2254(b)(3) or Rule 5. Section 2254(b)(3), which requires any waiver of the nonexhaustion defense to be express, merely specifies the circumstances in which a court *may* deem the nonexhaustion defense waived; it does not *require* a court to deem a habeas defense waived in any set of circumstances. At most, this subsection can be read as *allowing* implied waiver of defenses other than nonexhaustion. The purpose of the requirement in Rule 5 that certain defenses, including the statute of limitations, be raised in the answer is designed to relieve the petitioner of the burden of overcoming these defenses in the initial petition. *See Femia*, 47 F.3d at 523. Furthermore, the rule does not address what a court may or must do if a State fails to comply with this rule. Section 2254(b)(3) and Rule 5 must be construed consistent with the general principles underlying habeas corpus jurisprudence. *Calderon*, 523 U.S. at 554. Nothing in these provisions eliminates the habeas courts' discretion to decline to apply waiver of a defense, express *or* implied, when the interests of comity, federalism, and finality are served by doing so.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY RAISING THE LIMITATIONS DEFENSE

A. Respondent's waiver, inadvertent or otherwise, did not deprive the district court of inherent authority.

A State's waiver of the AEDPA limitations defense does not abolish the court's inherent authority to dismiss an untimely petition on this ground. The analysis "turns not on waiver, but rather on whether courts have the inherent power to protect themselves from habeas abuse, post-answer, consistent with Congress'[s] intent, and whether, where a court exercises that power, the habeas movant is prejudiced." *Bendolph*, 409 F.3d at 168; *see also Hardiman*, 971 F.2d at 504 (fact that unraised defense may be waived does not mean court cannot raise defense *sua sponte* when issues of comity and judicial efficiency indicate court should not reach merits of habeas claim). Thus contrary to Day's suggestion, the doctrine of waiver does not operate in every case to prohibit habeas courts from raising defenses not raised by the State.

A State's waiver of the limitations defense in a § 2254 case, inadvertent or otherwise, is a factor for the federal court to consider in exercising its discretion to *sua sponte* notice and dismiss an untimely petition. *Yeatts*, 166 F.3d at 262 (court should consider whether state's failure to raise procedural default defense was intentional or inadvertent, and where intentional, court should be circumspect in addressing issue); *see also Magouirk*, 144 F.3d at 359 (where state's waiver is result of purposeful or deliberate decision to forego defense, court should typically presume waiver to be valid). The State's conduct should inform, but not invariably control, the court's discretion. Indeed, it may be an abuse of discretion for a district court to dismiss a habeas petition *sua sponte* based on a defense the respondent has intentionally waived. *See Henderson v. Thieret*,

859 F.2d 492, 498 (7th Cir. 1988) (reversing district court's dismissal of habeas petition on procedural default grounds because dismissal overrode assistant attorney general's statement that state did not wish to pursue procedural default defense), *cert. denied*, 490 U.S. 1009 (1989). This determination is best made on a case-by-case basis.

Here, the district court's exercise of discretion to raise the limitations defense was particularly appropriate because the applicability of the defense was apparent from the entirety of Respondent's answer. The answer does incorrectly concede "the petition is timely" *because it was "filed after 352 days of untolled time."* J.A. 24 (emphasis added). However, the documents referenced in and attached to the answer establish the petition was filed after 388 days of untolled time—after AEDPA's one-year statute of limitations expired. The magistrate judge used these documents to calculate *sua sponte* the number of untolled days, and, upon arriving at a different number than Respondent, issued a show cause order (J.A. 26-30)—implicitly finding erroneous Respondent's position that the petition was timely. The Eleventh Circuit described Respondent's concession of timeliness under these circumstances as "patently erroneous" and found such concession indistinguishable from a failure to plead the defense altogether. *Day*, 391 F.3d at 1194.[4]

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[4] A concession that is patently erroneous is not a waiver merely because it is explicit. A "waiver" requires the intentional relinquishment of a known right. *E.g.*, *United States v. Olano*, 507 U.S. 725, 733 (1993) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *Bendolph*, 409 F.3d at 167. Other courts have held a mistaken concession is not a waiver. *Washington v. James*, 996 F.2d 1442, 1448 (2d Cir. 1993) (government's erroneous concession of procedural defense constitutes "merely an innocent error [and] there is no analytic or policy reason to treat it any differently than a failure to raise the defense at all"), *cert. denied*, 510 U.S. 1078 (1994); *Strader v. Allsbrook*, 656 F. 2d 67, 68 (4th Cir. 1981) (state did not waive exhaustion requirement notwithstanding erroneous concession that petitioner "had exhausted

Where, as here, the applicability of the defense is clear from the face of the record, it is not an abuse of discretion for a federal court to exercise its *sua sponte* authority to raise a procedural bar to habeas. *Ortiz v. Dubois*, 19 F.3d 708, 715 (1st Cir. 1994) (dismissing claim on procedural default grounds notwithstanding state's failure to properly preserve defense because default was clear on face of record and would be needless expenditure of scarce judicial resources to address merits), *cert. denied*, 513 U.S. 1085 (1995).

B. Day had notice and an opportunity to be heard.

When a court exercises its discretion to raise the statute of limitations defense *sua sponte*, justice requires the court to give the parties prior notice and an opportunity to respond. *Hill*, 277 F.3d at 707; *Acosta*, 221 F.3d at 124. This requirement serves the specific interests of the parties in the adversarial process as well as the broader public concerns implicated in habeas proceedings. *McMillan v. Jarvis*, 332 F.3d 244, 249 (4th Cir. 2003). Here, Day was given notice the court viewed his petition as untimely and was given twenty days to show why the petition should not be dismissed on this basis. (J.A. 26-30). Day timely responded. (J.A. 31-32). Therefore, Day received adequate notice and an opportunity to be heard before his untimely petition was dismissed.

In addition to providing the petitioner an opportunity to explain why the petition should not be dismissed, the notice requirement also provides the government the opportunity to inform the court if it affirmatively desires to waive the defense.

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his State court remedies . . . and [was] entitled to adjudication of (his) contentions on the merits"); *Davis v. Campbell*, 608 F.2d 317, 320 (8th Cir. 1979) ("erroneous pleading by the state [is] . . . an express waiver of the exhaustion requirement").

Here, the State did not respond to the show cause order because its concession of timeliness was based on an erroneous calculation and it agreed the petition should be dismissed as untimely. In another case, however, the State might respond to the show cause order by informing the court that it desires to waive the defense. Any such affirmative waiver would be a factor to be considered in evaluating whether a dismissal on a ground affirmatively waived by the State is a proper exercise of the court's discretion. *Henderson*, 859 F.2d at 498; *Yeatts*, 166 F.3d at 262.

C. Day is not prejudiced by the dismissal.

Where, as here, the court raises the defense after the government has filed an answer, the court should also consider whether the petitioner is prejudiced by the *sua sponte* raising of a habeas defense. *Bendolph*, 409 F.3d at 168. The prejudice analysis examines, among other factors, the length of delay in raising the defense, the reason for the delay, and the actual prejudice suffered by the petitioner as a result of the delay. *See id.* at 168-69; *Long*, 393 F.3d at 399-401.[5]

In this case, the elapsed time between the Respondent's answer and the magistrate judge's show cause order first raising the statute of limitations was approximately nine months. (J.A. 5, 6). During this time, the parties were simply awaiting a ruling from the court. The parties did not engage in any additional briefing, did not engage in discovery, and did not conduct an evidentiary hearing. Day did not incur additional expense during this period. Nothing in the record suggests, nor does Day assert, that the Respondent withheld the defense for an improper

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[5] These factors are similar to those courts consider in deciding whether to allow amendment of a pleading pursuant to Rule 15(a) of the Federal Rules of Civil Procedure. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

purpose. These record facts indicate no prejudice to Day as a result of the court raising the statute of limitations defense *sua sponte*. *See Long*, 393 F.3d at 399 (petitioner not prejudiced where government mistakenly failed to raise statute of limitations defense in answer and 14-month delay between answer and court's raising of defense was not attributable to government); *Bendolph*, 409 F.3d at 168-69 (two-year delay did not constitute prejudice where government did not act in bad faith, petitioner had not engaged in discovery and suffered no loss or diminution in ability to prepare case). The only purported claim of prejudice Day identifies is the time and expense spent briefing the merits and the thwarted expectation of receiving a decision on the merits. (Pet. Brief 18). This claim is insufficient, by itself, to constitute prejudice. *See Long*, 393 F.3d at 399 (frustrated expectation of not having untimely habeas petition heard on merits does not establish prejudice). Because Day was not prejudiced when the district court raised the statute of limitations *sua sponte*, the court did not abuse its discretion by doing so.

Although Day was not prejudiced, he argues that a district court can never raise the statute of limitations defense *sua sponte* because a State might "strategically hold[] a limitations defense in reserve" for use on appeal while seeking a favorable ruling on the merits. (Pet. Brief 14, 38). Indeed, this Court identified this possibility in *Granberry*, citing it as a reason for declining to adopt an "inflexible" rule that would always treat nonexhaustion as a bar to consideration of the merits of a claim. 481 U.S. at 131-32. However, the Court also declined to adopt the petitioner's argument in that case—that the court must regard a State's omission of the nonexhaustion defense as an absolute waiver. *Id.* at 131, 133. Instead, the Court adopted a middle course that allows courts to examine the individual circumstances of each case to determine whether the interests of comity and federalism would be better served by invoking the exhaustion issue or addressing the merits. *Id.* at 133, 134.

So too here, hypothetical misconduct by the State, undisputedly absent in the present case, should not serve as the basis for adopting a blanket prohibition on habeas courts raising a statute of limitations defense *sua sponte*. Instead, courts should be allowed to determine whether it is appropriate to invoke the statute of limitations defense in an individual case. If a State intentionally withholds the defense in order to pursue a favorable result on the merits, this conduct would likely constitute bad faith by the State and would strongly suggest prejudice to the petitioner. *Bendolph*, 409 F.3d at 169 (identifying bad faith by government as an element of prejudice to petitioner). Even if the State's omission of the defense is not intentional, a court's *sua sponte* invocation of the defense late in the proceedings might not serve the interest of judicial economy. *See Esslinger*, 44 F.3d at 1528 n.45 (where district court raised procedural default bar after the evidentiary hearing on the merits, court saved neither time nor resources). Day's concerns about hypothetical scenarios not present in this case are fully addressed by allowing a court to determine whether, in an individual case, *sua sponte* invocation of the statute of limitations causes prejudice to the petitioner and advances the interests of comity, federalism, finality, and judicial economy.

Also contrary to Day's argument, a district court's proper exercise of discretion in raising the limitations defense *sua sponte* does not somehow transform the court into an advocate for one party to the prejudicial detriment of the other. Rather, in so doing the court is simply engaging in effective case management consistent with the letter of AEDPA, the spirit of AEDPA's avowed congressional purpose, and this Court's habeas jurisprudence.

Finally, the simple fact remains Day was not prejudiced because the petition was untimely. Respondent's erroneous concession of timeliness was based on a patently incorrect computation. *See Day*, 391 F.3d at 1194. Unfortunately,

limitations calculations in habeas proceedings are prone to these types of errors. *See Bendolph*, 409 F.3d at 167 ("[H]abeas cases present sometimes difficult questions of time computation .... all too easily, habeas respondents and courts may err in their calculation.") (internal quotations and citations omitted). This propensity for error supports the need for district court discretion. The ultimate effectuation of AEDPA's purposes and the concomitant societal interests cannot and must not rest solely on the shoulders of an individual government attorney's ability to calculate correctly the limitations period in a given case. *Bendolph*, 409 F.3d at 166. Congress did not intend AEDPA to operate as a "gotcha" system of justice where application of essential guidelines can turn on one defective link in the government chain. Providing the court with the discretion advocated herein thus protects both the overriding societal interests and ensures the petitioner will not only be heard but also will not suffer any prejudice by an untoward application of the limitations bar. Nothing in this Court's habeas jurisprudence compels a different result.

D. Day's petition was untimely.

1. ***The issue of the habeas petition's timeliness is not fairly included within the certiorari petition.***

Day urges this Court to find that that his habeas petition was timely in any event because, he asserts, the one-year statute of limitations was tolled during the period he could have but did not seek this Court's review of the denial of his motion for post-conviction relief. (Pet. Brief 45-49). This issue is not properly before the Court. Indeed were this Court to find the petition was timely, this finding would obviate the need to address the very issues on which the Court granted certiorari. If the district court dismissed a timely habeas petition as untimely, this fact alone would warrant reversal.

The Court grants certiorari with the expectation of being able to decide the merits of the issue. *See Schiro v. Farley*, 510 U.S. 222, 229 (1994) (declining to address alternative ground for affirming judgment because "the propriety of reaching the merits of a dispute is an important consideration in deciding whether or not to grant certiorari"). "Only the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court." Supreme Court Rule 14.1(a). The Court has adhered consistently to this rule. *See, e.g.*, *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 563 n.9 (1999); *Lambrix v. Singletary*, 520 U.S. 518, 527 n.1 (1997); *Hagen v. Utah*, 510 U.S. 399, 409-10 (1994); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (per curiam); *Yee v. Escondido*, 503 U.S. 519, 537 (1992). This Court's near-uniform practice is to consider only the precise questions presented in a petition for certiorari along with any "subsidiary question[s] fairly included therein." Supreme Court Rule 14.1(a); *City of Sherrill v. Indian Nation*, 125 S. Ct. 1478, 1490 n.8 (2005); *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 457 (1995) ("[W]e will entertain issues withheld until merits briefing only in the most exceptional cases.") (internal quotation omitted). Accordingly, the Court has repeatedly refused to entertain questions following the grant of certiorari that, while related to the questions presented, are analytically and factually distinct. *See, e.g.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha*, 510 U.S. at 32; *Yee*, 503 U.S. at 537.

In this case, the Court cannot address whether the habeas petition was timely without departing from Rule 14.1(a) and the Court's consistent past practice. The questions presented in the petition for certiorari, and the text of the petition itself,[6] address

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[6] The petition mentions the State's concession of timeliness was not erroneous, but does so only to cast doubt on the Eleventh Circuit's characterization of the State's concession as "patently erroneous." Petition for Cert. 19-20.

(1) whether the State waived the limitations defense and (2) whether Habeas Rule 4 deprives the district court of the power to *sua sponte* dismiss a habeas petition on the basis of a ground not raised in the answer. The antecedent issue of whether the habeas petition was timely—and therefore whether the State's concession of timeliness was erroneous—is factually and analytically distinct from these questions. Factually, the events relevant to the petition's timeliness pertain to Day's direct appeal and state court motions for collateral relief, while the events relevant to the questions presented pertain to the proceedings following Day's federal habeas petition. Legally, the question of whether the petition was timely would turn solely upon the Court's construction of 28 U.S.C. § 2244(d)(2), a statute otherwise irrelevant to the questions presented. Additionally, the Court should decline to review the timeliness issue because it was neither briefed to nor decided by the Eleventh Circuit. *E.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 214, 239 (1990) (declining to consider issues not raised or reached below); *Federal Trade Comm'n v. Grolier Inc.*, 462 U.S. 19, 22 n.6 (1983) (same).

2. *State post-conviction proceedings are no longer "pending" after they have concluded.*

If this Court addresses Day's argument regarding the petition's timeliness, it should reject the argument. Section 2244 provides that AEDPA's one-year period of limitation is tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). The purpose of this provision is to "promote[] the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief *while state remedies are being pursued*." *Duncan*, 533 U.S. at 179 (emphasis added). By its clear terms, the

provision "accord[s] tolling effect only to properly filed applications for State [as opposed to Federal] post-conviction or other collateral review." *Id.* at 180 (internal quotation omitted). A petition to this Court is not an "application for State post-conviction or other [State] collateral review." *See id.* at 173 ("We find no likely explanation for Congress' omission of the word 'Federal' in § 2244(d)(2) other than that Congress did not intend properly filed applications for federal review to toll the limitation period."); *see also, e.g., Crawley v. Catoe*, 257 F.3d 395, 400 (4th Cir. 2001), *cert. denied*, 534 U.S. 1080 (2002); *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999), *cert. denied*, 528 U.S. 1084 (2000). Therefore, Day's theory that his habeas petition was timely can only be correct if such an application remains "pending" after it becomes final, during the period that the prisoner could, but doesn't, petition for certiorari. The Court should conclude it does not.

In *Carey v. Saffold*, 536 U.S. 214 (2002), the Court considered whether an application for State post-conviction relief remained "pending" within the meaning of § 2244(d)(2) during discrete intervals in a State's post-conviction process in which a criminal defendant's application for relief was momentarily not under court consideration. *Id.* at 217. Answering the question in the affirmative, the Court held that the application remains "pending" for § 2244(d)(2) purposes "until the application has achieved final resolution through the State's post-conviction procedures." *Id.* at 220. The Court explained in *Carey* that the ordinary meaning of "pending" is "in continuance" or "not yet decided" when used as an adjective, and "through the period of continuance . . . of" or "until the . . . completion of" when used as a preposition. *Id.* at 219-220. Because § 2244(d)(2) refers only to "application[s] for State post-conviction or other [State] collateral review," *see Duncan*, 533 U.S. at 180, the ordinary meaning of § 2244(d)(2) provides that the limitations period described in § 2244(d)(1) is tolled only "through the period of continuance . . . of [the State proceedings]," "until the . . .

completion of [the State proceedings], or only so long as the State proceedings are "in continuance" or "not yet decided."

This Court should reaffirm the holding of *Carey* in this context. Section 2244(d)(2) fully comports with AEDPA's comity interest, without unduly impacting AEDPA's finality interest, only if the tolling period described in the statute is limited to the time necessary for a state prisoner's pursuit of state remedies. "By tolling the limitation period for the pursuit of state remedies . . . § 2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts." *Duncan*, 533 U.S. at 180. "At the same time, the provision limits the harm to the interest in finality by according tolling effect only to 'properly filed applications for State post-conviction or other collateral review.'" *Id.* at 179-80.

A state prisoner's decision to petition this Court for a writ of certiorari from a State court's denial of "state remedies" implicates different concerns. In many respects, it implicates the same concerns as a subsequent habeas petition because it represents an attack in federal court on the integrity of a state court judgment which, until resolved, defeats the finality of the state court judgment. Accordingly, Day's construction of § 2244(d)(2) contravenes the purposes of AEDPA and § 2244(d)(2) to the extent it extends the tolling period beyond the conclusion of State court proceedings.

Day's construction of § 2244(d)(2), while championed by the Sixth Circuit in *Abela v. Martin*, 348 F.3d 164, 172-73 (6th Cir. 2003) (en banc) (Martin, J., writing for majority in 6-5 decision), *cert. denied*, 541 U.S. 1070 (2004), has been explicitly repudiated by each of the ten other circuits to have considered the issue. *See David v. Hall*, 318 F.3d 343, 345 (1st Cir.), *cert. denied*, 540 U.S. 815 (2003); *White v. Klitzkie*, 281 F.3d 920, 924 (9th Cir. 2002); *Smaldone v. Senkowski*, 273 F.3d 133, 137-38 (2d Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002); *Crawley*

v. Catoe, 257 F.3d 395, 401 (4th Cir. 2001), *cert. denied*, 534 U.S. 1080 (2002); *Stokes v. District Att'y*, 247 F.3d 539, 542 (3d Cir.), *cert. denied*, 534 U.S. 959 (2001); *Snow v. Ault*, 238 F.3d 1033, 1035-36 (8th Cir.), *cert. denied*, 532 U.S. 998 (2001); *Gutierrez v. Schomig*, 233 F.3d 490, 492 (7th Cir. 2000), *cert. denied*, 532 U.S. 950 (2001); *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), *cert. denied*, 531 U.S. 1166 (2001); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999), *cert. denied*, 592 U.S. 1099 (2000); *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999), *cert. denied*, 528 U.S. 1084 (2000).

The clear majority view is that a petition for a writ of certiorari to the United States Supreme Court is simply not an application for state review. Section 2244(d)(2) only tolls time when "a *state* prisoner is attempting, *through proper use of state court procedures, to exhaust state court remedies*," and that time spent pursuing *a federal writ* is not included in the tolling period described in § 2244(d)(2). *E.g.*, *White*, 281 F.3d at 924; *see also Crawley*, 257 F.3d at 400; *Rhine*, 182 F.3d at 1155-56. This view is supported by the text of AEDPA and the policies of comity, federalism and finality that govern habeas proceedings. Accordingly, if the Court decides to address this issue, it should reject Day's argument and adopt the clear majority view of the circuits.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the decision of the Eleventh Circuit affirming the district court's dismissal of Day's petition for writ of habeas corpus be affirmed.

RESPECTFULLY SUBMITTED,

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IN THE

Supreme Court of the United States

PATRICK A. DAY,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR THE PETITIONER

Neither the State nor its *amici* make any effort to defend the decision below. The Eleventh Circuit held that: (1) AEDPA's statute of limitations is not controlled by ordinary waiver rules (Pet. App. 4a); and (2) under Habeas Rule 4 and principles of comity, finality, and federalism, courts have an "obligation" to dismiss untimely petitions *sua sponte*. *Id.* at 5a. As to the first holding, the State now concedes (Br. 5, 21) that AEDPA's limitations period is an affirmative defense that can be waived. Here, the State waived the defense by failing to raise it in the district court, as well as by conceding in its answer that Day's petition was timely.

With respect to the second holding, the State does not argue that Habeas Rule 4 applies post-answer. Moreover, it concedes (at 14) that a court is *not* obligated to impose a waived limitations defense. Instead, it now takes the position (at 3, 8) that unwritten policies of finality, comity, and federalism give a court inherent discretionary authority to raise and impose such a defense. Accordingly, the remaining question for this Court is whether the State's waiver forecloses dismissal or is merely one factor the lower courts should have weighed in deciding whether to impose the limitations defense *sua sponte*. Because the Eleventh Circuit took neither approach, reversal is required.

In reversing, this Court should hold that it is error for a court to raise and impose a waived limitations defense *sua sponte*, especially when the State expressly concedes timeliness. AEDPA's text, applicable procedural rules, and the policy balance struck by Congress all support this conclusion. Yet even if this Court disagrees, concluding instead that courts have discretion to impose the defense, the State has not overcome the strong presumption against doing so here. At minimum, the Court should prescribe factors to guide such discretion and remand for the lower courts to apply them.

I. THE DISTRICT COURT ERRED BY DISMISSING DAY'S PETITION *SUA SPONTE* BASED ON A DEFENSE THE STATE NEVER ADVOCATED.

Paying little heed to the text of the statute and rules, the State attempts to bring this case within the holding of *Granberry* v. *Greer*, arguing that principles of finality, comity, and federalism give courts inherent authority not only to raise a waived limitations defense but also to impose it without any input from the party to whom it belongs. Yet the exhaustion requirement addressed in *Granberry* is different from limitations; not all habeas defenses were created equal.

While exhaustion is a unique common-law limit on habeas relief created by this Court and given special properties based on comity and federalism,[1] AEDPA's statute of limitations is exclusively a creature of Congress. 28 U.S.C. § 2244(d). Consideration of Congress's intent with respect to *sua sponte* imposition of limitations starts with the text of the statute and the relevant procedural rules. Unlike the exhaustion requirement, the words chosen by Congress here—"period of limitation"—have a settled meaning outside the habeas context and under the Civil Rules. Pet. Br. 9-14.

Civil Rule 81 and Habeas Rule 11 confirm that this meaning applies in the habeas context because it is "not inconsistent" with the habeas statutes and rules. Pet. Br. 19-31. This Court had no reason to conduct a Rule 81/11 analysis in *Granberry* because the exhaustion requirement is unique to habeas cases. But when the matter in question is addressed by a Civil Rule, this Court's decisions begin with that rule and consider whether the habeas statutes or rules "limit [its] application * * * to the present case." *Gonzalez*, 125 S. Ct. 2646; *Mayle*, 125 S. Ct. at 2569-70, 2574-75. The State and

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[1] *Granberry*, 481 U.S. at 133 (focusing on common-law "history of the exhaustion doctrine" to determine whether courts could insist on exhaustion *sua sponte*); Pet. Br. 40-41. Procedural default, nonretroactivity, and abuse of the writ were also created by this Court.

its *amici* ignore this analytical approach and the settled meaning of limitations.

A. AEDPA's Text, Applicable Rules, And Relevant Policies Show That Courts May Not Impose A Waived Limitations Defense *Sua Sponte*.

1. Under the adversary system of the Civil Rules, a "period of limitation" like the one Congress chose in § 2244(d) is a non-jurisdictional affirmative defense. Civil Rules 8(c), 12(b), and 15 require a defendant to plead limitations in an answer or amended answer, and courts hold the defense waived if it is not raised in compliance with these rules. Pet. Br. 9-10, 30-31.

"Since [limitations] is a waivable defense, it ordinarily is error for a district court to raise the issue *sua sponte*." *Haskell*, 864 F.2d at 1273; 5 Wright & Miller § 1278, at 644-45 & n.12 (waiver of limitations defense "results in * * * its exclusion from the case"); Tex. Br. 1 ("courts generally do not dismiss cases based on waived affirmative defenses"); Pet. Br. 13-14 & n.17. This conclusion follows from the Civil Rules as well as the fundamental adversary "rule that points not argued will not be considered." *Burke*, 504 U.S. at 246 (Scalia, J., concurring).

The State complains that this analysis gives short shrift to a court's inherent authority. Not so. Day certainly agrees that courts have inherent powers, particularly in areas where they have "the sanction of wide usage" and "ancient origin" (*Link*, 370 U.S. at 630-31), where there is a fundamental breakdown in the adversary process,[2] or where the court's actions are unconstrained by existing rules. See Fed. R. Civ. P. 83(b); *Carlisle* v. *United States*, 517 U.S. 416, 425-28 (1996). But limitations does not fall within any of these categories. Civil

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[2] *E.g.*, *Arizona* v. *California*, 530 U.S. 392, 412 (2000) (res judicata "in special circumstances"); *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (per curiam) (failure to defend by fugitive); *Link*, 370 U.S. at 629 (failure to prosecute).

Rules 8, 12, and 15 specifically address how the limitations defense should be raised, and the authorities cited above confirm that *sua sponte* dismissal based on limitations is far from widely used.[3] Accordingly, the notion of inherent power does not alter the conclusion that it is error for a court to impose a waived limitations defense *sua sponte*.[4]

2. When Congress chose to include the settled civil concept of a "period of limitation" in AEDPA, it adopted this principle that *sua sponte* treatment is error. Pet. Br. 15-18, 22; *Scott*, 286 F.3d at 931. As this Court recently confirmed,

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."

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[3] Aside from *Bendolph*, the State and its *amici* cite only one case in which a court dismissed *sua sponte* based on a waived limitations defense outside the PLRA context (where such dismissals are authorized by statute, see Pet. Br. 27). In that case, the other defendants—not the court—raised the defense. *Grand Rapids Plastics, Inc.* v. *Lakian*, 188 F.3d 401, 405, 407 (6th Cir. 1999).

[4] Some courts express this conclusion in terms of power or authority rather than error. *E.g.*, *Nardi*, 354 F.3d at 1141 (district court "lacks the authority" to dismiss petition as time-barred when State fails to plead limitations defense); *Wagner*, 307 F.2d at 412 (district court "had no right" to apply waived limitations defense *sua sponte*). Under either rubric, however, the result in this case is the same: the district court's judgment dismissing the petition *sua sponte* should be reversed. *Cf. Unitherm Food Sys., Inc.* v. *Swift-Eckrich, Inc.*, 126 S. Ct. 980, 985 (2006) (court lacks power to order relief absent proper motion by party); *id.* at 990 (Stevens, J., dissenting) (order may be abuse of discretion).

INS v. *St. Cyr*, 533 U.S. 289, 312 n.35 (2001) (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)).

Civil Rule 81 provides a second reason why the Civil Rules governing waiver and *sua sponte* imposition of the limitations defense apply to habeas cases. While Habeas Rule 11 states that federal courts "may" apply the Civil Rules in habeas cases, Civil Rule 81(a)(2) implements this authority by declaring that the Civil Rules "*are* applicable" to habeas proceedings "to the extent that the practice * * * is not set forth in statutes of the United States * * * or [the Habeas Rules], and has heretofore conformed to the practice in civil actions" (emphasis added).

The State has no response to Rule 81 and does not dispute that its conditions for applying the Civil Rules on waiver and *sua sponte* treatment are met.[5] As our opening brief explains (at 20-21), habeas pleading practice was historically adversarial and placed the burden on the State to plead reasons why the writ should not issue. See also NACDL Br. 16-17 n.3 (collecting pre-Civil Rules cases regarding pleading and waiver of habeas defenses).

Furthermore, nothing in "the text of" the habeas statute or rules indicates that Congress intended to depart from the traditional principle that an unpleaded limitations defense may not be imposed *sua sponte*. *Gonzalez*, 125 S. Ct. at 2646; see Pet. Br. 21-31. The summary dismissal provisions of Habeas Rule 4 do not apply post-answer, and new Habeas Rule 5 confirms the State's duty to raise the limitations defense in its answer. Pet. Br. 28-30. The State asserts (at 18-19) that nothing in these rules or the habeas statute eliminates a court's discretion to raise a waived limitations defense *sua sponte*, but it identifies no textual basis for inferring that such discretion exists in the first place. Under Rule 81 and the

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[5] Indeed, the State concedes (at 5) that ordinary waiver rules apply to the habeas statute of limitations.

doctrine of implied repeal, statutory silence is not enough to defeat the application of the Civil Rules. Pet. Br. 33.

The State also attempts to avoid the civil principle against *sua sponte* treatment by quibbling about the degree to which habeas proceedings are civil in nature. That is beside the point. Day agrees that there are significant distinctions between civil and habeas proceedings. Because Congress chose to adopt the civil concept of a "period of limitation" in AEDPA, however, the statute should be interpreted accordingly. Moreover, under Civil Rule 81, Habeas Rule 11, and this Court's cases, the Civil Rules apply to habeas proceedings to the extent they are not inconsistent with the habeas statute or rules. Pet. Br. 19-20. The State has shown no such inconsistency here.

3. The State's brief largely ignores the analysis above, arguing instead that its non-textual interest in finality (and through it comity and federalism) gives a habeas court discretion to impose a waived limitations defense *sua sponte* without any input from the party to whom it belongs. This argument, however, does not alter the conclusion that *sua sponte* dismissal based on limitations is not a "well-acknowledged" inherent power. *Link*, 370 U.S. at 631. Nor does it provide any indication that Congress intended to replace the traditional civil principle that it is error for a court to impose a waived limitations defense *sua sponte* with a new discretionary practice.

Yet even if this Court were to consider non-textual policies, the State's interest in finality would not trump the adversary system. Our "adversary system is designed around the premise that the *parties* * * * are responsible for advancing the facts and arguments entitling them to relief." *Castro*, 540 U.S. at 386 (Scalia, J., concurring in part and concurring in judgment) (emphasis added). As discussed above, the history of habeas pleading practice shows that it is an adversary process. Moreover, this Court recently confirmed that the adversary system governs AEDPA's limitations defense spe-

cifically. In *Pliler* v. *Ford*, the Court held that having judges "advise" *pro se* litigants about how to avoid that defense "would undermine [their] role as impartial decisionmakers." 542 U.S. at 23'. Instead, "calculating [the AEDPA] statute[] of limitations [is a] task[] normally and properly performed by trained counsel." *Ibid.*

The State has no answer to *Pliler*. It does not dispute that the adversary process is equally undermined when a judge investigates whether a State litigant has a viable limitations defense that it failed to raise and, if so, dismisses the petition *sua sponte*. Indeed, it would be fundamentally unfair for a court to aid the State's lawyer but not a *pro se* petitioner with "the potentially burdensome, time-consuming, and fact-intensive task of making a case-specific investigation and calculation of * * * the AEDPA limitations period." *Pliler*, 542 U.S. at 232. A State litigant must play by the same rules as other litigants; it is not entitled to favored treatment.

Moreover, it is especially damaging to the adversary system when a court goes beyond simply flagging a defense for the parties' belated consideration (*cf. Bendolph*, 409 F.3d at 168) and actually asserts and adjudicates it without any input from the party to whom it belongs. *United States* v. *Wiseman*, 297 F.3d 975, 980 (10th Cir. 2002). That is precisely what happened here: the magistrate judge did not merely "raise" the limitations defense and have "some say" in whether to apply it, as the State would have this Court believe. See Resp. Br. 3, 5, 8, 11, 15. Instead, the judge overrode the State's express concession of timeliness and imposed the defense *sua sponte* without ever considering whether the State wished to pursue the defense. In so doing, the judge stepped into the role of advocate for the State, depriving Day of an impartial forum and stripping the State of the prerogative to determine its own defenses.[6] The adversary system should not tolerate such actions.

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[6] The State incredibly asserts (at 24) that there was no reason for it to advocate dismissal after the judge's initial order regarding limi-

Congress regularly entrusts the effectuation of even high-priority policies to the adversary process. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 419 (1978). When it intends to create an exception to that process, it is generally quite explicit.[7] *Ibid.* (congressional intent to distort adversary process "cannot be lightly assumed"); *United States* v. *Pryce*, 938 F.2d 1343, 1353 (D.C. Cir. 1991) (Silberman, J., dissenting in part). As discussed above, there is no indication that Congress intended to depart from the traditional principle that it is error for a court to impose a waived limitations defense *sua sponte*. Accordingly, the State's policy interest in finality does not support *sua sponte* dismissal.

4. The State's appeal to the virtues of finality is also flawed because it: (1) fails to distinguish between the value of finality in general versus in the marginal cases where a viable limitations defense has been waived; and (2) fails to account for other policies that weigh heavily against *sua sponte* dismissal. These competing values are best reconciled by holding that it is error to dismiss a habeas petition *sua sponte* based on a waived limitations defense.

Day agrees that AEDPA's limitations defense promotes finality, and there are many procedures in place to ensure that this policy is protected in run-of-the-mine cases. For example, under Habeas Rule 4, a court may dismiss a facially untimely petition summarily before an answer is filed, or it may authorize the State to file a motion to dismiss based on limitations. Alternatively, the State may plead the limitations defense in its answer or (under certain circumstances) in an

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tations because it agreed the petition was untimely. The judge, of course, had no way to know of the State's tacit agreement.

[7] Thus, the adversary system is the background principle unless it is expressly altered by statute or rule. This view is perfectly consistent with Congress's decision to mandate certain pre-answer *sua sponte* dismissals under Habeas Rule 4. *Cf.* U.S. Am. Br. 15.

amended answer.[8] Thus, post-answer *sua sponte* dismissal generally is not necessary to accommodate finality.

In the rare case where an untimely petition survives these procedures, the policies against imposing the waived limitations defense *sua sponte* vastly outweigh any marginal finality benefit from *sua sponte* dismissal.[9] These policies include judicial neutrality and restraint, the adversary system, efficiency,[10] the uniform application of procedural rules, and the importance of keeping the habeas remedy open to meritorious claims. Pet. Br. 35-39; *McCleskey*, 499 U.S. at 492-93. In particular, the State's proposed discretionary standard for *sua sponte* dismissal is vague and likely to create problems of efficiency and uniformity, spawning wasteful satellite litigation on matters far removed from the merits and yielding inconsistent results. Pet. Br. 38-39.

On the other hand, applying the civil rule against *sua sponte* dismissal in these rare cases burdens finality only minimally, if at all. Pet. Br. 42-44. Tellingly, the State has no response to this Court's decisions in *Gonzalez* and *Mayle*,

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[8] Habeas Rule 5; Fed. R. Civ. P. 15(a); see also 28 U.S.C. § 2243. Of course, if this case is remanded, it would be far too late for the State to amend its answer to plead the limitations defense. *Retzer* v. *Wood*, 109 U.S. 185, 187-88 (1883); Pet. Br. 30-31; p. 15, *infra*.

[9] See *Harris* v. *Reed*, 489 U.S. 255, 264 (1989) (holding that "applying [the rule at issue] to habeas burdens th[e] interests [of finality, federalism, and comity] only minimally, if at all. The benefits, in contrast, are substantial.").

[10] As *amicus* Texas notes (at 3, 17-18, 20), the greatest amount of resources usually have been expended once the merits of a habeas petition are fully briefed (as they were here) because petitions are typically decided on the papers. At this point, it often will be highly inefficient for a court to undertake *sua sponte* the burdensome, time-consuming, fact-intensive, and error-prone task of calculating AEDPA's limitations period instead of deciding the fully-briefed merits issues. Pet. Br. 38; *Wiseman*, 297 F.3d at 980.

which confirm that finality is not offended when a generally-applicable civil rule provides an exception to the limitations period. Pet. Br. 25, 43. Furthermore, the finality goal of AEDPA's limitations period is not to produce default but to stimulate prompt federal review of the merits. *Id.* at 24; see Resp. Br. 27 ("Congress did not intend AEDPA to operate as a 'gotcha' system of justice"). Given that non-capital petitioners like Day already have ample incentives to file timely (Pet. Br. 43 n.39), the threat of *sua sponte* dismissal is not necessary to promote this goal.

Importantly, *Granberry* had no need to reconcile competing values because it did not recommend dismissal of unexhausted petitions with prejudice. Rather, it advised courts to consider requiring additional state proceedings prior to federal review, thereby accommodating comity and federalism without harming the other values discussed above. 481 U.S. at 134. Dismissing a petition *sua sponte* based on a waived limitations defense, however, tramples those values with little corresponding benefit to finality. Accordingly, this Court should hold that such a dismissal is error.

5. The State does not press comity and federalism as independent interests justifying *sua sponte* dismissal, but rather treats them as tag-alongs to finality. See Resp. Br. 6, 15. This case is thus quite different from *Granberry*, where comity and federalism were central. 481 U.S. at 133-34.

Unlike exhaustion and the other common-law doctrines on which the State relies, AEDPA's statutory limitations defense is not a mechanism for deference to state courts and their procedures. The State attempts (at 17) to characterize the defense as "a ground that the State did not have the opportunity to address at a prior, appropriate time," *McCleskey*, 499 U.S. at 493, but that is incorrect. Instead, the defense cuts off federal review altogether based on a collateral issue of timing that state courts never consider. Pet. Br. 41; see *Calderon* v. *Ashmus*, 523 U.S. 740, 747-48 (1998). Accordingly, limitations does not implicate comity and federalism.

The State's only involvement with the federal limitations defense is as a litigant. As our opening brief explains (at 37), a State litigant is in a far better position than a court to decide whether asserting the limitations defense would serve its interests in comity, federalism, and finality. Indeed, there is no reason to believe the State inadequately protects these interests as a general matter; they certainly are not beyond its concerns as a party. *Cf.* Resp. Br. 5-8. Thus, there is no reason to saddle federal courts with the difficult, time-consuming task of calculating AEDPA's limitations period on their own. See Pet. Br. 38. When the State waives the limitations defense, "the district court should assume that the waiver is justified." *Esslinger*, 44 F.3d at 1528.[11] Curing that waiver through *sua sponte* dismissal is reversible error. Pet. Br. 45; *Nardi*, 354 F.3d at 1142; *Scott*, 286 F.3d at 931.

B. The State's View Ignores Congress's Choices And Would Have Untoward Consequences.

1. The State's arguments in favor of discretionary *sua sponte* dismissal misunderstand the nature of a limitations defense. In contrast to common-law restrictions like exhaustion, a period of limitation is not a "prohibition" on federal habeas relief (Resp. Br. 16), and it "does not operate by its own force as a bar" to review. *Finn* v. *United States*, 123 U.S. 227, 232 (1887). Rather, it is merely a claim-processing rule that defines the time for bringing suit, and its benefits belong to individual parties. Pet. Br. 9; Civ. Pro. Profs. Br. 24. Because limitations is not a flat ban on habeas relief, a court need not preserve it by acting *sua sponte*.

Congress understood this difference between a "period of limitation" and common-law restrictions on granting the writ, and it used prohibitive language only for the latter when it

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[11] See also *Boardman* v. *Estelle*, 957 F.2d 1523, 1537 (9th Cir. 1992) (per curiam) ("Concerns of federalism and respect for a state's criminal judgments are marginal here because the state brought the problem on itself" by failing to raise defense).

codified them in AEDPA. With respect to exhaustion, for example, Congress provided that the writ "shall not be granted unless" state remedies have been exhausted, and it expanded courts' ability to raise exhaustion *sua sponte* by limiting waiver. 28 U.S.C. § 2254(b). The statutory analogues of nonretroactivity and abuse of the writ contain similar language. See 28 U.S.C. §§ 2244(b) ("shall be dismissed unless"), 2254(d) ("shall not be granted * * * unless").

Moreover, Congress explicitly required that certain capital habeas applications "must be filed * * * not later than 180 days after" the completion of direct review. 28 U.S.C. § 2263(a). In contrast, Congress provided that a "1-year period of limitation shall apply" to habeas applications by state prisoners generally. It did *not* say that the writ "shall not be granted" unless an application is filed within one year, nor did it say that an application "must be filed" not later than one year after the relevant trigger date. This difference in language signals that Congress intended to adopt an ordinary statute of limitations defense, not a strict prohibition on habeas relief that courts may be called upon to enforce *sua sponte* after it has been waived.

2. As discussed on pages 8-9 above, there are many different procedures for winnowing out untimely petitions. If the State thinks these existing procedures are not sufficient and desires a different outcome based on certain policy considerations, it should go to Congress or to the Advisory Committee. *Lonchar*, 517 U.S. at 328; *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864 (1984). This Court does not rewrite procedural rules by opinion.

When Congress concludes that certain policies call for an exception to the adversary system, it explicitly authorizes *sua sponte* action. *E.g.*, 11 U.S.C. § 105(a); Fed. R. Crim. P. 52(b); Habeas Rule 4; Pet. Br. 25-27. In the Prison Litigation Reform Act (PLRA), for example, Congress provided for *sua sponte* dismissal "at any time" if the court determines that the prisoner failed to state a claim. 28 U.S.C. § 1915(e)(2).

Courts use this statute to dismiss PLRA cases *sua sponte* based on limitations. U.S. Am. Br. 27.

In habeas cases, however, Congress balanced the relevant policies and chose a "period of limitation"—a concept that has a settled meaning and is governed by settled procedural rules, including the principle that *sua sponte* dismissal based on a waived limitations defense is error. Congress obviously considered the subject of *sua sponte* dismissal, as it provided for pre-answer summary dismissals under Habeas Rule 4. It also included a safety valve in Civil Rule 15(a), which allows defendants to resuscitate waived defenses in certain circumstances by amending their answers.

But that is as far as Congress went. Its decision not to provide for *sua sponte* dismissal of waived limitations defenses at any time, as it did in the PLRA, is entitled to respect. Because the above rules directly address *sua sponte* dismissal and how waiver may be cured, *Lonchar* holds that courts may not alter those rules through the exercise of general equitable powers. 517 U.S. at 316. The State's position that certain policies are weighty enough to support an inherent discretionary power of *sua sponte* dismissal should be rejected as an impermissible attempt to undermine the balancing of interests undertaken by Congress. *Id.* at 327.

3. Finally, the State's sweeping argument that finality, comity, and federalism support a discretionary dismissal power proves too much outside the exhaustion context, where comity and federalism were directly at issue. The State asserts (at 18) that courts have "discretion to raise [waived] defenses" and "to *deny* relief" when "doing so advances the interests of comity, finality, and federalism." In its view (Br. 17), these interests "are implicated by *any* federal collateral attack on a state court criminal judgment." According to the State, therefore, courts may dismiss or deny any habeas petition in order to protect the state judgment, regardless of what the rules say. Not to be outdone, *amicus* United States makes

the astonishing argument (at 27-28) that compliance with rules is an "empty formalism" with "no purpose."

Obviously, that is not the law. As *McCleskey* recognizes, a "background norm of procedural regularity [is] binding" in habeas cases. 499 U.S. at 490. Indeed, the history of the writ shows "the gradual evolution of more formal judicial, statutory, or rules-based doctrines of law * * * that regularize and thereby narrow the discretion that individual judges can freely exercise." *Lonchar*, 517 U.S. at 322. Contrary to the State's suggestion, courts are "not authorize[d] * * * to ignore this body of statutes, rules, and precedents" or create "ad hoc judicial exception[s]" to accommodate equitable considerations such as comity, finality, and federalism. *Id.* at 323, 328. Adherence to these rules serves several important purposes, including efficiency and uniformity. Pet. Br. 33-34, 37-39; Civ. Pro. Profs. Br. 21-22.

Because the State did not follow the rules for pleading limitations, it procedurally defaulted the defense and must bear the consequences. The district court erred in dismissing *sua sponte* based on that waived defense.

II. THE DISTRICT COURT ERRED BY DISREGARDING THE STATE'S EXPRESS CONCESSION OF TIMELINESS.

1. In both *Granberry* and this case, the State defaulted the defense at issue by failing to raise it in the district court. Yet the State went further here: it expressly conceded in its answer that Day's "petition is timely; filed after 352 days of untolled time." J.A. 24. The district court erred by refusing to give binding effect to this express waiver. Pet. Br. 44-50.

The State responds (at 22 n.4) that its concession does not rise to the level of an "intentional relinquishment of a known right," which is the standard for express waivers of constitutional rights. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). The waiver standard varies, however, depending on the right at stake. *United States* v. *Olano*, 507 U.S. 725, 733 (1993).

With respect to habeas defenses, many courts hold that pleading the opposite of the defense—*e.g.*, the petition is timely, or the claims are exhausted and not procedurally defaulted—constitutes an express waiver. Pet. Br. 44; *Royal* v. *Taylor*, 188 F.3d 239, 247 (4th Cir. 1999).

That holding is particularly appropriate here, as the State acknowledges (at 22) that all the information it needed to make the limitations calculation was attached to the answer in which it conceded timeliness. An explicit concession based on full information certainly should have more effect than a silent failure to raise a defense. See *Fed. Ins. Co.* v. *Gates Learjet Corp.*, 823 F.2d 383, 387 (10th Cir. 1987) (leave to amend to add limitations defense denied where party had been aware of facts for some time). Moreover, the State cannot credibly argue that its concession was inadvertent given that it failed to assert the limitations defense even after the magistrate judge issued his show-cause order. *Cf. Long*, 393 F.3d at 401. Thus, the judge had no reason to suspect that the State wished to retract its concession, and he erred by failing to honor it.

2. The Eleventh Circuit attempted to neutralize the State's concession of timeliness by holding that it was "patently erroneous"[12] and thus no more binding than a default.[13] Pet. App. 4a. As we have consistently argued, however, Day's petition was in fact timely—or, at the very least, *Abela* supports a substantial argument that it was timely. Pet. 19-20; Pet. Reply 8-9; Pet. Br. 6-7, 45-50. Accordingly, the Elev-

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[12] Other courts of appeals agree with the Eleventh Circuit that whether a waived defense is certain or debatable (or, conversely, whether the argument against it is patently erroneous or substantial) affects whether a court should overlook the waiver and raise the defense *sua sponte*. *E.g.*, *Long*, 393 F.3d at 399; *Yeatts*, 166 F.3d at 262; *Smith* v. *Horn*, 120 F.3d at 408-09; *United States* v. *Giovannetti*, 928 F.2d 225, 227 (7th Cir. 1991).

[13] In this way, the Eleventh Circuit decided the issue of whether Day's petition was timely. See Pet. Br. 6-7; *cf.* Resp. Br. 22, 29.

enth Circuit erred in excusing the State from its binding concession by labeling it patently erroneous.

The State attempts to dodge the timeliness issue by arguing (at 27-29) that it is not fairly included in the questions presented. See Sup. Ct. R. 14.1(a). Its argument, however, rests on a misstatement of our position. Day does not assert the timeliness of his habeas petition as a free-standing ground for reversal. Instead, he argues that its timeliness is "essential to [the] analysis" of and "intimately bound up with"[14] the question whether "the State waive[d] a limitations defense to [Day's] habeas corpus petition when it * * * expressly concede[d] that the petition was timely." Pet. I (first question presented). The Eleventh Circuit correctly recognized, and the State's brief shows (at 22-23), that the timeliness issue plays a significant role in determining the effect of the State's express concession—*i.e.*, whether it should be treated as a binding waiver or disregarded as patently erroneous. Moreover, the State correctly argues (at 26-27) that timeliness affects whether the *sua sponte* dismissal prejudiced Day. See Part III, *infra*. For these reasons, the Court should decide whether Day's petition was timely (or at least whether there is a substantial argument for timeliness).

3. The State's argument against timeliness does not withstand scrutiny. It offers no response to the structural analysis in our opening brief (at 47-50), which shows that 28 U.S.C. § 2244(d)(2) tolls limitations during the post-conviction certiorari period. Instead, it asks this Court to rewrite the statute. Although § 2244(d)(2) states that limitations is tolled while an "*application* for State post-conviction * * * review" is pending, the State urges (at 31) that tolling should last only

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[14] *Kolstad* v. *Am. Dental Ass'n*, 527 U.S. 526, 540 (1999); *Procunier* v. *Navarette*, 434 U.S. 555, 559-60 n.6 (1978); see *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996) (considering whether "issue * * * is a 'predicate to an intelligent resolution' of the question presented" (quoting *Vance* v. *Terrazas*, 444 U.S. 252, 258-59 n.5 (1980)); see also *City of Sherrill*, 125 S. Ct. at 1490 n.8.

while "State court *proceedings*" are pending. In its view (at 30, 32), tolling always stops at the conclusion of state court proceedings, regardless of whether the prisoner subsequently files a certiorari petition concerning his state application and regardless of this Court's action on the petition.

The short response to this view is that Congress did not write the statute that way. *Russello*, 464 U.S. at 23. "State" refers to the character of the "application" as a remedy created by state law, not to the character of the court presently conducting proceedings on that application. Thus, an "application" for post-conviction relief retains its state character and remains pending while this Court can be called upon to review a judgment on that application under 28 U.S.C. § 1257. *Abela*, 348 F.3d at 170-71. It becomes final—and tolling ends—only when certiorari is denied or "the time for filing a certiorari petition expires." *Clay*, 537 U.S. at 527. Under this rule, Day's petition was timely and the State's concession of that fact is binding. Pet. Br. 45; Pet. App. 16a.

This Court did not hold otherwise in *Carey*, which only considered whether an application remained pending between two levels of state court proceedings. 536 U.S. at 217-18. *Carey*'s statement that a state application remains pending until it "has achieved final resolution through the State's post-conviction procedures" (*id.* at 220) merely answers this question; it does not exclude this Court's review of a state application from the tolling period. *Cent. Va. Cmty. Coll.* v. *Katz*, 126 S. Ct. 990, 996 (2006) (court not bound by dicta when point at issue was not debated in the prior case).

Moreover, restricting the tolling period to state proceedings would yield harmful and absurd results. Given the running statute of limitations, many state prisoners would need to file federal habeas petitions in district court while still preparing or awaiting a ruling on certiorari petitions that raise the same claims in the state post-conviction context. These duplicative proceedings would waste judicial resources and produce troublesome conflicts of jurisdiction. In addition, it

is ridiculous to think that a state post-conviction application transforms into a federal post-conviction application when this Court can review it under 28 U.S.C. § 1257 and then reverts to a state application if this Court remands to state court, leaving a tolling gap in between. Yet that is precisely the consequence of the State's position. The Court should reject that position and hold that Day's petition was timely.

III. ALTERNATIVELY, THE PROPER DISCRETIONARY FACTORS DO NOT SUPPORT DISMISSAL.

For these reasons, it is error for a district court to dismiss a habeas petition *sua sponte* based on a waived limitations defense. Given that the State not only failed to plead the defense but affirmatively conceded timeliness and never advocated dismissal even after the district court raised the limitations issue *sua sponte*, dismissal certainly was improper here. The Court should reverse and remand for consideration of Day's petition on the merits.

Yet even if the State were correct that *Granberry* gives a district court discretion to impose a waived limitations defense *sua sponte*, reversal would still be required because the courts below never had an opportunity to exercise that discretion under the proper standards. Instead, the Eleventh Circuit erroneously held that it was *obligated* to impose the defense.[15] Thus, if the Court holds that *Granberry* applies to the limitations defense created by Congress, it should prescribe factors to guide the lower courts' discretion. *Martin* v. *Franklin Capital Corp.*, 126 S. Ct. 704, 710 (2005) ("Discretion is not whim, and limiting discretion according to legal

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[15] Pet. App. 4a. Aside from rejecting Day's argument for equitable tolling, the magistrate judge simply dismissed the petition after concluding it was untimely. *Id.* at 10a-15a. He "made no attempt to determine whether the interests of justice would be better served" by imposing the limitations defense *sua sponte* on these facts. *Granberry*, 481 U.S. at 136.

standards helps promote the basic principle of justice that like cases should be decided alike.").

The State concedes (at 21) that waiver of the limitations defense (whether intentional or inadvertent) is a factor to be considered in determining whether to raise the defense *sua sponte*. Furthermore, this Court has recognized a "presumption" against adjudication of issues not raised through normal habeas procedures. *McCleskey*, 499 U.S. at 490;[16] *cf. Arizona* v. *California*, 530 U.S. 392, 412-13 (2000) (raising forfeited defense *sua sponte* should be reserved for "special circumstances" to avoid "eroding the principle of party presentation so basic to our system of adjudication"). This presumption is particularly weighty here because the State affirmatively conceded timeliness based on full information and never advocated the limitations defense even after the magistrate judge raised it. *Wiseman*, 297 F.3d at 980 ("The government's complete failure to assert the * * * defense weighs heavily against its *sua sponte* enforcement.").

Another relevant factor, as the State points out (at 24), is whether Day was prejudiced by the *sua sponte* dismissal. Given that Day's petition was timely as explained above, dismissing it as untimely was obviously prejudicial. Other elements of prejudice include the State's unexplained 18-month delay in advocating the limitations defense, which it did for the first time in its appellees' brief, and the significant delay caused by the magistrate judge's *sua sponte* decision to invoke an inapplicable defense the State correctly did not raise. *Long*, 393 F.3d at 399-400. That decision has forced

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[16] See also *Howard* v. *Bouchard*, 405 F.3d 459, 476 (6th Cir. 2005) (courts should not "embrace *sua sponte* raising of procedural default issues as a matter of course"); *United States* v. *Barron*, 172 F.3d 1153, 1156-57 (9th Cir. 1999) (waiver of procedural default overlooked only in "extraordinary circumstances"); *Hardiman*, 971 F.2d at 505 ("[I]n an adversarial system such as ours, it will generally be better to consider only those defenses that are properly raised by the parties.").

Day to sit in prison and litigate the limitations issue for over two years in order to obtain resolution of his significant, fully briefed claims for habeas relief on the merits.

Other factors that weigh against imposing the limitations defense *sua sponte* here include: the substantial arguments regarding timeliness (p. 15 & n. 12, *supra*); the lack of prejudice to the State, viewed in terms of the policies behind the limitations defense, from Day's (at worst) 23-day delay in filing his petition;[17] and the balance of policies against *sua sponte* dismissal (pp. 6-11, *supra*).

None of these factors was considered by the courts below. If this Court wishes to apply them in the first instance, it should hold that the State has not overcome the presumption against imposing the waived limitations defense *sua sponte* and remand for consideration of the merits. If the Court concludes that the above factors are not dispositive, it should at minimum list the factors it considers relevant and remand. Giving the parties an opportunity to develop and present arguments tailored to those factors will enable the lower courts to exercise their discretion properly.[18] *Cf. Granberry*, 481 U.S. at 136.

CONCLUSION

For these reasons, as well as those stated in our opening brief, the court of appeals' judgment should be reversed.

Respectfully submitted.

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[17] Pet. Br. 12, 43 n.38; Tex. Br. 20; see *Henderson* v. *U.S. Fid. & Guar. Co.*, 620 F.2d 530, 534 (5th Cir. 1980); *cf. Rideau* v. *Whitley*, 237 F.3d 472, 478 (5th Cir. 2000)

[18] Some factors, such as the merits of Day's underlying claims (see Tex. Br. 20), have not been addressed by either party on appeal.

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PATRICK DAY, PETITIONER

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether the State forfeits a defense under the statute of limitations governing habeas corpus petitions when it fails to plead or otherwise raise that defense, but instead mistakenly concedes that the petition was timely.

2. Whether, after a State has filed an answer to a habeas petition, Rule 4 of the Rules Governing Section 2254 Cases permits a district court to dismiss the petition *sua sponte* based on a ground not raised in the answer.

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5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* (3d ed. 2004) 26

In the Supreme Court of the United States

No. 04-1324

PATRICK DAY, PETITIONER

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether a district court has the power *sua sponte* to dismiss a habeas petition as untimely, when the State has erroneously conceded in its response that the petition was timely. Because the one-year time limit for a state prisoner to file a habeas petition is the same as the period within which a federal prisoner must file a motion for postconviction relief, see 28 U.S.C. 2244(d)(1); 28 U.S.C. 2255 para. 6, and in light of similarities between the relevant procedural rules governing collateral review of state and federal convictions, compare Rule 4 of the Rules Governing Section 2254 Cases (Section 2254 Rules) with Rule 4(b) of the Rules Governing Section 2255 Proceedings (Section 2255 Rules), the Court's decision in this case will influence, if not

control, the resolution of cases presenting similar questions under 28 U.S.C. 2255. See, *e.g.*, *United States* v. *Bendolph*, 409 F.3d 155 (3d Cir. 2005) (en banc), petition for cert. pending, No. 05-3 (filed June 24, 2005). The United States therefore has a significant interest in this case.

STATEMENT

1. In 1998, following a jury trial in a Florida state court, petitioner Patrick Day was convicted of second-degree murder and sentenced to imprisonment for a term of 55 years. J.A. 1, 10. Day appealed only his sentence, and the Florida First District Court of Appeals affirmed on December 21, 1999. *Day* v. *State*, 746 So. 2d 1219. Because Day did not seek review in this Court, the one-year limitations period for filing a federal habeas petition, established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 101, 110 Stat. 1217 (28 U.S.C. 2244(d)(1)), began running 90 days after the state court's decision, when the time to file a petition for certiorari expired, *i.e.*, on March 20, 2000. Pet. App. 2a, 9a. See 28 U.S.C. 2244(d)(1)(A); *Clay* v. *United States*, 537 U.S. 522, 532 (2003).

2. On March 9, 2001, Day filed a motion for post-conviction relief in state court, claiming five grounds of ineffective assistance of counsel. J.A. 10-13; Pet. App. 9a. The filing of that state court application tolled Day's one-year period for filing a federal habeas petition, 28 U.S.C. 2244(d)(2), but at that point Day had already used 353 of his 365 days. Pet. App. 2a, 12a. The state trial court denied Day's motion for relief, as well as an amended motion, which the court construed as a second motion. *Id.* at 9a. The state district court of appeals affirmed on October 9, 2002, and, following the denial on November 15, 2002, of Day's motion for rehearing, the court of appeals' mandate issued on December 3, 2002. J.A. 14-16. With that event, pursuant to Eleventh Circuit precedent, Day's unexpired time for filing a fed-

eral habeas petition began to run again. See *Nyland* v. *Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000) (motion for postconviction relief is pending until Florida court of appeals' mandate issues). Thus, Day had until December 16, 2002 (a Monday), to file a federal habeas petition. Day did not, however, file his federal petition until January 8, 2003, after the limitations period had run. Pet. App. 2a, 9a-10a; J.A. 17-20.

3. Day's petition did not include the information that would be necessary to determine if it was timely. Although the petition reflected the dates on which his conviction was affirmed and his state court motion for postconviction relief was filed, J.A. 18, it did not specify the date on which the court of appeals' mandate issued in the state habeas proceeding. See J.A. 19. Nor were the court documents that would have revealed that information attached to the petition.

On February 4, 2003, a magistrate judge issued an order indicating that the petition was "in proper form" and directing the State to file a response, which was to include all arguments on exhaustion of state remedies or procedural default. J.A. 21-22. The order did not mention the statute of limitations. *Ibid.* In its March 17, 2003, response, Florida stated that the petition "is timely; filed after 352 days of untolled time." J.A. 24. The State attached to its response copies of the relevant state court proceedings, including a copy of the Florida appellate court's December 3, 2002, mandate.

On December 11, 2003, a new magistrate judge to whom Day's petition had been assigned issued an order *sua sponte* directing Day to show cause why his petition should not be dismissed as untimely. J.A. 26-30. The order to show cause explained that, because 353 days had passed between the last day for filing a petition for certiorari on direct appeal and the filing of Day's state postconviction motion, his federal habeas petition was due within twelve days of when the state court of appeals issued its mandate affirming the denial of postconviction relief, *i.e.*, by Monday, December 16, 2002. See J.A. 29 (citing *Nyland* v. *Moore*, *supra*; Fed. R. Civ. P. 6(a)).

In his response to the Order to Show Cause, Day noted that Florida's response had "agreed the Petition was timely" and that the court had waited nearly a year to raise the issue of timeliness. Day then argued that the petition was not untimely because the one-year period for filing a federal petition under Section 2244(d) continued to be tolled for 90 days after the denial of his motion for rehearing in the state collateral appeal, during which time he could have filed a petition for certiorari in this Court. In addition, Day urged that the Section 2244(d) deadline should be further tolled because state public defenders had withheld his trial transcript for 352 days, thereby delaying his ability to file his state collateral attack. J.A. 31-32.

The magistrate judge recommended dismissal of the petition. Pet. App. 8a-15a. The magistrate judge rejected Day's argument that his petition was timely. *Id.* at 12a (citing *Coates* v. *Byrd*, 211 F.3d 1225 (11th Cir. 2000) (90-day period for filing a petition for certiorari from a collateral appeal does not toll the time for filing a federal habeas petition), cert. denied, 531 U.S. 1166 (2001)). The magistrate judge also found that Day's argument that he was denied prompt access to trial transcripts did not justify equitable tolling under 28 U.S.C. 2244. Pet. App. 13a-14a. Day filed an objection to the magistrate's Report and Recommendation with the district court. Day did not renew either of his arguments why his petition was timely. Instead, Day argued for the first time that the State's statement, in its response, that the petition was timely foreclosed a *sua sponte* dismissal by the court on that basis. J.A. 34-36.

The district court adopted the magistrate's report and dismissed Day's petition. Pet. App. 7a. The court also denied a certificate of appealability. J.A. 8. The Eleventh Circuit granted a certificate of appealability to determine whether the district court had erred in addressing the timeliness of the petition after the State had conceded that it was timely. J.A. 37.

4. The court of appeals, in a per curiam opinion, affirmed the district court's dismissal of Day's petition. Pet. App. 1a-6a. The court of appeals first noted that it had, in *Jackson* v. *Secretary for the Department of Corrections*, 292 F.3d 1347, 1349 (11th Cir. 2002), joined four other courts of appeals in holding that, "even though the statute of limitations is an affirmative defense, the district court may review *sua sponte* the timeliness of the section 2254 petition" under AEDPA. Pet. App. 4a. The court of appeals reasoned that "there is no meaningful difference between an erroneous failure to plead the statute of limitations as an affirmative defense, as occurred in *Jackson*, and a concession of timeliness that was patently erroneous, as occurred here." *Ibid.*[1] The court further explained that, while "[i]n an ordinary civil case, a 'failure to plead the bar of the statute of limitations constitutes a waiver of the defense,'" *ibid.* (quoting *Day* v. *Liberty Nat'l Life Ins. Co.*, 122 F.3d 1012, 1015 (11th Cir. 1997), cert. denied, 523 U.S. 1119 (1998)), habeas petitions are controlled by different considerations. Unlike ordinary civil suits, Rule 4 of the Section 2254 Rules provides, in relevant part, that "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner." Thus, the court of appeals concluded, in order to "promote comity, finality, and federalism," Congress had, in AEDPA, assigned federal courts "an obligation

[1] In the district court, the State had not responded to the Order to Show Cause or to Day's objections to the magistrate judge's Report and Recommendation before the court had acted. On appeal, however, the State affirmatively argued that the habeas petition was untimely and that the concession of timeliness in the State's response was due to "a clerical mistake by counsel; that is, the failure to account for the 36 days which passed between conclusion of state court proceedings and the date Day submitted his habeas petition to prison officials." C.A. Appellee Br. 5.

to enforce the federal statute of limitations" on habeas petitions. Pet. App. 5a.[2]

SUMMARY OF ARGUMENT

District courts have authority to give effect to the one-year statute of limitations period Congress has established for federal court review of state court convictions, whether or not a State has overlooked or mistakenly conceded the limitations bar in its answer. It is undisputed that the limitations bar can be vindicated by the district court *sua sponte* before the State has been called upon to respond. But the district court's decision to call for an answer does not strip the court of the authority to give effect *sua sponte* to Congress's determination that federal courts should not hear untimely petitions.

There is nothing in the rules concerning habeas procedure, or, indeed, in the rules governing civil proceedings generally, that divests the district court of its independent authority to abide by the limitations on habeas review. Nor would the importation of such a restriction be sensible. Because habeas petitioners are not required by the Section 2254 Rules to supply the district court at the outset with all of the information necessary to determine whether a petition is timely, the district court will often have to call for a response from the State in order to obtain that information. Once the habeas court does so and becomes aware of the limitations obstacle, sound principles of finality, comity, and federalism require the district court to dismiss the petition, at least ab-

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[2] As petitioner notes (Br. 9 n.9), the Court distinguished in *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), between a defendant's "waiver" of a defense, *i.e.*, "the intentional relinquishment or abandonment of a known right," and "forfeiture," which is "the failure to make the timely assertion of a right." *Id.* at 458 n.13 (citation omitted). Although the court of appeals referred to this case as raising a question of "waiver," Pet. App. 4a, petitioner makes no claim that the State knowingly abandoned its statute of limitations defense. Thus, this brief refers to the State's alleged "forfeiture," although many of the sources cited are not always so precise in their terminology.

sent prejudice or other countervailing concerns. Any suggestion that the habeas rules, or borrowed rules of civil procedure, imply an absence of such power is squarely foreclosed by the Court's decisions. Thus, the State's act of filing a response in this case, even one that erroneously conceded that the petition was timely, did not deprive the district court of its authority to enforce the limitations period that Congress has adopted to promote the prompt filing and disposition of habeas corpus petitions.

ARGUMENT

I. A DISTRICT COURT MAY DISMISS AN UNTIMELY HABEAS PETITION *SUA SPONTE*, EVEN IF THE STATE FAILS TO RAISE THE DEFENSE IN ITS ANSWER

In order "to advance the finality of criminal convictions," Congress has "adopted a tight time line, a one-year limitation period" for federal habeas cases. *Mayle* v. *Felix*, 125 S. Ct. 2562, 2573 (2005); 28 U.S.C. 2244(d)(1); 28 U.S.C. 2255 para. 6. AEDPA's one-year limitations period "quite plainly serves the well-recognized interest in the finality of state court judgments"; it "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan* v. *Walker*, 533 U.S. 167, 179 (2001); *Rhines* v. *Weber*, 125 S. Ct. 1528, 1534 (2005). To further that policy, district courts may dismiss untimely habeas petitions *sua sponte*, even when the State has erroneously conceded the timeliness of the petition.

A. Congress Has Assigned A Unique Gatekeeper Function To Federal District Courts In Habeas Cases

This Court has long recognized the important principles of comity, federalism, and finality that are implicated by federal habeas review of state court judgments. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 491 n.31 (1976). In light of "the pro-

found societal costs that attend the exercise of habeas jurisdiction," *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) (quoting *Smith* v. *Murray*, 477 U.S. 527, 539 (1986)), the Court has "impose[d] significant limits on the discretion of federal courts to grant habeas relief," *id.* at 554-555. It has, for example, restricted the courts' ability to grant habeas relief on the basis of procedurally defaulted claims, *United States* v. *Frady*, 456 U.S. 152, 164-169 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72, 90-91 (1977), retroactive application of "new rules," *Teague* v. *Lane*, 489 U.S. 288, 308-310 (1989) (plurality opinion), non-prejudicial claims of trial error, *Brecht* v. *Abrahamson*, 507 U.S. 619, 637-638 (1993), or where the petitioner has abused the writ, *McCleskey* v. *Zant*, 499 U.S. 467, 487 (1991).

Congress's purposes in enacting AEDPA were "to further the principles of comity, finality, and federalism" that gave rise to this Court's own limitations on habeas relief. *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). See *Mayle*, 125 S. Ct. at 2573-2574. In particular, Congress understood that collateral review of state convictions undermines the finality that "is essential to both the retributive and the deterrent functions of criminal law," *Calderon*, 523 U.S. at 555, a concern that applies to postconviction review of federal as well as state convictions, *Frady*, 456 U.S. at 164-165. See *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) (noting that one of AEDPA's purposes is to "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases").

Like the other limits on habeas review, AEDPA's statute of limitations "implicates values beyond the concerns of the parties." *Acosta* v. *Artuz*, 221 F.3d 117, 123 (2d Cir. 2000). The habeas limitations period "promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." *Ibid.*

See *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (noting that limitations periods "protect defendants *and* the courts") (emphasis added); *Robinson* v. *Johnson*, 313 F.3d 128, 137 (3d Cir. 2002) (habeas time limit protects against "wasting precious legal and judicial resources"), cert. denied, 540 U.S. 826 (2003).

Because the costs associated with federal habeas review are "societal costs," *Calderon*, 523 U.S. at 554, society's interests in enforcing the judicially and congressionally imposed limits on such review "transcend the concerns of the parties to [the] action." *Acosta*, 221 F.3d at 122 (citation omitted). As such, the habeas rules have provided, since their adoption by Congress in 1976, for the courts to exercise a unique gatekeeper function.[3] Unlike most civil litigation, in habeas cases Congress assigned to district courts the responsibility to dismiss unmeritorious petitions, including on grounds of untimeliness, even before the government has filed a responsive pleading. Rule 4 of the Section 2254 Rules (1976).

Rule 4 explicitly provides that the district court "must promptly examine" the petition and "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition." Rule 4 of the Section 2254 Rules. Only if the petition is not dismissed *sua sponte* under this provision does the district court "order the respondent to file an answer, motion, or other response." *Ibid.* Rule 4(b) of the Section 2255 Rules similarly establishes that the district court is to perform an initial screening function and dismiss a motion that, on its face, does not entitle the movant to relief. Indeed, as the terms of Rule 4 make clear, the district court is not only *authorized* to dismiss a habeas petition for any apparent reason that would foreclose relief, it is *required* to do so. See

[3] Congress initially delayed implementation of the proposed rules for proceedings under Sections 2254 and 2255. See Pub. L. No. 94-349, § 2, 90 Stat. 822. By statute, Congress subsequently "approved" the proposed rules, with certain amendments. Pub. L. No. 94-426, § 1, 90 Stat. 1334.

Rule 4 of the Section 2254 Rules (directing that the district court "*must* promptly examine" the petition and "*must* dismiss" it if "the petitioner is not entitled to relief") (emphasis added). See also Rule 4(b), Section 2255 Rules (same). The Advisory Committee Notes confirm that intent, noting that under 28 U.S.C. 2243 "it is the *duty* of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Rule 4 of the Section 2254 Rules, Advisory Committee Notes (1976) (emphasis added); 28 U.S.C. 2243 (directing district court to issue an order to show cause to the respondent "unless it appears from the application that the * * * person detained is not entitled" to relief).

Rule 4 thus clearly contemplates summary dismissal of a Section 2254 petition or Section 2255 motion by a district court on any fatal ground, even if the ground is one that, in an ordinary civil case, generally must be asserted by the opposing party. "Congress intended the courts to play a more active role in [habeas] cases than they generally play in many other kinds of cases." *Hardiman* v. *Reynolds*, 971 F.2d 500, 504 (10th Cir. 1992). And Rule 4, in particular, "differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses." *Kiser* v. *Johnson*, 163 F.3d 326, 328 (5th Cir. 1999).[4]

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[4] The judicial responsibility established in Rule 4 is just one example of the gatekeeper function the courts serve with respect to habeas petitions. "In AEDPA, Congress established a 'gatekeeping' mechanism for the consideration of 'second or successive habeas corpus applications' in the federal courts." *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 641 (1998) (quoting *Felker* v. *Turpin*, 518 U.S. 651, 657 (1996)). Thus, "[b]efore a second or successive application [for a writ of habeas corpus] is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. 2244(b)(3)(A).

B. The Courts' Gatekeeper Role Justifies Judicial Initiative In Enforcing The Limitations Period Placed On Habeas Petitions Even When The State Fails To Raise Or Erroneously Concedes The Limitations Issue

As the court of appeals observed, Pet. App. 4a, the circuit courts that have addressed the issue have uniformly concluded that Rule 4 authorizes a district court *sua sponte* to dismiss a habeas petition, without requiring any answer from the government, if the court can determine from the face of the petition and accompanying documents that it is out of time, as long as the court gives the petitioner notice and an opportunity to be heard. See *ibid.*; *Long* v. *Wilson*, 393 F.3d 390, 402-403 (3d Cir. 2004); *Hill* v. *Braxton*, 277 F.3d 701, 706 (4th Cir. 2002); *Scott* v. *Collins*, 286 F.3d 923, 930 (6th Cir. 2002); *Herbst* v. *Cook*, 260 F.3d 1039, 1042-1043 & n.3 (9th Cir. 2001); *Acosta*, 221 F.3d at 124; *Kiser*, 163 F.3d at 328-329. See also *United States* v. *Bendolph*, 409 F.3d 155, 164 (3d Cir. 2005) (en banc), petition for cert. pending, No. 05-3 (filed June 24, 2005) (Section 2255 case); *United States* v. *Sosa*, 364 F.3d 507, 513 (4th Cir. 2004) (same).[5] Indeed, petitioner concedes (Br. 42) that "[b]efore an answer is filed, Habeas Rule 4 allows courts to dismiss untimely petitions summarily."

The power of a habeas court to act *sua sponte* does not vanish once the State files a response. Although petitioner states (Br. 28) that "the Habeas Rules prohibit post-answer *sua sponte* dismissals," there is nothing in Rule 4 or any other rule that expressly precludes a court from doing so. Nor, contrary to petitioner's contention (Br. 29), does Rule 4's express grant of authority *sua sponte* to dismiss defective petitions pre-answer prohibit, by "negative implication," post-answer court-initiated dismissals. This Court rejected a simi-

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[5] While recognizing a district court's authority under Rule 4 to raise a petition's untimeliness *sua sponte*, the Sixth and Ninth Circuits have held that the district court loses that authority once the State has filed an answer. See *Scott*, 286 F.3d at 930; *Nardi* v. *Stewart*, 354 F.3d 1134, 1141 (9th Cir. 2004).

lar inference in *Link* v. *Wabash Railroad*, 370 U.S. 626 (1962). There, the petitioner argued that Federal Rule of Civil Procedure 41(b)'s grant to the district court of authority to dismiss a complaint on a defendant's motion for failure to prosecute, "by negative implication, prohibits involuntary dismissals for failure of the plaintiff to prosecute *except* upon motion by the defendant." *Id.* at 630. The Court rejected that argument, holding that "[n]either the permissive language of the Rule * * * nor its policy requires us to conclude that it * * * abrogate[s] the power of courts, acting on their own initiative" to dismiss a dilatory plaintiff's complaint. *Ibid.* Petitioner advances the same argument here, and it fares no better.

As in *Link*, the courts' express authority under Rule 4 to dismiss an unmeritorious habeas petition *sua sponte* is not a unique exception to some general prohibition or an authorization of a judicial power that would otherwise be absent. Rather, it is a specific exhortation to exercise a more general authority to screen out and dismiss procedurally defective habeas petitions that exists even in the absence of specific authorization in a statute or rule. This Court has recognized the distinctive role the judiciary plays in enforcing limitations on habeas relief, even where doctrines of forfeiture might preclude their enforcement in private civil litigation. In *Granberry* v. *Greer*, 481 U.S. 129 (1987), for example, the Court held that a court of appeals has the power to dismiss a habeas petition for failure of the petitioner to exhaust state remedies even though the State failed to raise nonexhaustion in the district court. *Id.* at 134. Applying *Granberry*, at least eleven courts of appeals have held that a federal court in a habeas proceeding may similarly raise a petitioner's procedural default *sua sponte*, even if the respondent fails to do so.[6]

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[6] See *Sweger* v. *Chesney*, 294 F.3d 506, 520-521 (3d Cir. 2002), cert. denied, 538 U.S. 1002 (2003); *Lorraine* v. *Coyle*, 291 F.3d 416, 425-426 (6th Cir.), amended on denial of reh'g, 307 F.3d 459 (2002), cert. denied, 538 U.S. 947 (2003); *King* v. *Kemna*, 266 F.3d 816, 822 (8th Cir. 2001) (en banc), cert. denied, 535 U.S. 934 (2002); *Yeatts* v. *Angelone*, 166 F.3d 255, 261-262 (4th Cir.), cert.

The policy underlying that rule—that habeas courts have an independent role in promoting finality and reducing federal-state friction by avoiding habeas litigation that is precluded by a plain procedural bar—equally applies to a district court that has ordered a response by the State under Rule 4 and that thereafter notices a statute of limitations obstacle that the State itself overlooked.[7]

The courts' well-established gatekeeper role in habeas cases justifies the district court's exercise of authority to consider AEDPA's statute of limitations *sua sponte*, even when the State has filed an answer that fails to address the issue or that makes an erroneous concession of timeliness. See Pet. App. 4a-5a; *Jackson* v. *Secretary for the Dep't of Corrs.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (per curiam); *Long*, 393 F.3d at 401-404; *Bendolph*, 409 F.3d at 164 (same with respect to Section 2255 postconviction motion). As discussed, habeas limitations, including the statute of limitations, further

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denied, 526 U.S. 1095 (1999); *Boyd* v. *Thompson*, 147 F.3d 1124, 1127-1128 (9th Cir. 1998); *Magouirk* v. *Phillips*, 144 F.3d 348, 357 (5th Cir. 1998); *Brewer* v. *Marshall*, 119 F.3d 993, 999 (1st Cir. 1997), cert. denied, 522 U.S. 1151 (1998); *Esslinger* v. *Davis*, 44 F.3d 1515, 1524-1525 (11th Cir. 1995); *Washington* v. *James*, 996 F.2d 1442, 1448 (2d Cir. 1993), cert. denied, 510 U.S. 1078 (1994); *Hardiman*, 971 F.2d at 501-505; *Burgin* v. *Broglin*, 900 F.2d 990, 997-998 (7th Cir. 1990); see *Trest* v. *Cain*, 522 U.S. 87, 90 (1997) (reserving the issue). Cf. *United States* v. *Ishmael*, 343 F.3d 741, 743 (5th Cir. 2003) (court of appeals could apply the limitations on postconviction review established in *Powell* and *Teague* despite government's failure to raise those limitations in district court), cert. denied, 540 U.S. 1204 (2004).

[7] Similarly, even before Congress's statutory assignment to the courts of a gatekeeper function with respect to second and successive petitions, 28 U.S.C. 2244(b)(3)(A), the courts had enforced the limitation on abusive writs by denying such petitions *sua sponte*. See *Rodriguez* v. *Johnson*, 104 F.3d 694, 697 n.1 (5th Cir.) (citing pre-AEDPA cases), cert. denied, 520 U.S. 1267 (1997); *Femia*, 47 F.3d at 523. See *United States* v. *Barrett*, 178 F.3d 34, 44 (1st Cir. 1999) ("The core of AEDPA restrictions on second or successive § 2255 petitions is related to the longstanding judicial and statutory restrictions * * * known as the 'abuse of the writ' doctrine."), cert. denied, 528 U.S. 1176 (2000).

broader societal interests in comity, federalism, and finality that transcend the interests of the parties themselves. As the Third Circuit explained:

> The spectrum of interests that we identify * * * —finality and judicial efficiency, most notably, but also the public interest and the public reputation of judicial proceedings—are just as ably advanced post-answer as pre-answer when an untimely case is dismissed upon a district court's own motion. Recognition of this disentangles the overriding federal, judicial, and societal interests that are relevant to our analysis from those that concern the parties alone. * * * The above considerations * * * are no less persuasive in instances where the government has either waived the limitations defense or so concedes. Not only are habeas cases different, but, as for the AEDPA limitations provision, the government can claim no monopoly on its use.

409 F.3d at 167.

The district court's authority to raise AEDPA's statute of limitations *sua sponte* does not, contrary to petitioner's protestations (Br. 36-37), "offend[]" the adversarial system. As discussed below, see pp. 25-28, *infra*, courts can, in certain circumstances, raise issues that the parties themselves have not, even in traditional civil litigation. That is especially appropriate where, as in the habeas context, "[t]here are broader interests at stake * * * than only those belonging to the parties." *McMillan* v. *Jarvis*, 332 F.3d 244, 248 (4th Cir. 2003). See *Arizona* v. *California*, 530 U.S. 392, 412 (noting propriety of court raising *res judicata* defense *sua sponte* because the doctrine is "not based solely on the defendant's interest," but also "the avoidance of unnecessary judicial waste") (citation omitted), supplemented by 531 U.S. 1 (2000). Rule 4 itself makes clear Congress's understanding that "broader interests [are] at stake" in habeas litigation, and

petitioner's "adversary system" argument (Br. 36) cannot be squared with the district court's conceded authority (see *id.* at 42) to grant *sua sponte* dismissals under that Rule. That is particularly true because, as this Court has noted, it will frequently be the case that the timeliness of a habeas petition will not be ascertainable until after the State has filed, along with its answer, copies of documents from the state court proceedings. See *Pliler* v. *Ford*, 542 U.S. 225, 232 (2004).[8]

II. RULES 8(c) AND 12(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE DO NOT DEFEAT THE DISTRICT COURT'S AUTHORITY TO RAISE A HABEAS PETITION'S UNTIMELINESS *SUA SPONTE*

Petitioner bases his argument that the district court lacked authority to raise his petition's untimeliness on the characterization of habeas proceedings as "civil" in nature and on the claim that the Court should import into habeas procedure an assertedly strict rule under Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure that a defendant forfeits any affirmative defenses not raised in its answer. See Pet. Br. 10-11. Petitioner maintains that under Rule 81(a)(2) of the Federal Rules of Civil Procedure "the Civil Rules apply to matters of procedure not *directly* addressed by a habeas statute or rule," Pet. Br. 20 (emphasis added), and that Rule 11 of the Section 2254 Rules "compels" the courts to follow the Federal Rules of Civil Procedure "where the [Habeas Rules] are silent on an issue," Pet. Br. 20 n.25 (quoting *Kiser*, 163 F.3d at 328). Petitioner misunderstands the relationship of the Civil Rules to habeas proceedings to that extent.

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[8] Petitioner now contends (Br. 45-50) that his habeas petition was timely filed, and that the Court should for that reason as well hold that the district court erred in dismissing his petition. The United States takes no position on the question whether petitioner's habeas petition was, in fact, untimely. The question on which the Court granted certiorari assumes that the petition was untimely under AEDPA's statute of limitations, and this brief proceeds on that assumption.

The Federal Rules of Civil Procedure do not apply to habeas review if such application would be inconsistent with the distinctive role of the courts in enforcing limits on habeas review. Thus, if it were correct, as petitioner argues, that *sua sponte* enforcement of the AEDPA statute of limitations would be inconsistent with the Civil Rules, the consequence would not be to defeat the district court's authority to enforce the AEDPA statute of limitations, but rather to render Civil Rules 8(c) and 12(b) inapplicable to habeas proceedings.

A. The Courts Borrow Civil Rules In Habeas Cases Only To The Extent That Such Application Is Consistent With The Overall Framework And Policies Of Habeas Corpus

It is a considerable oversimplification to claim that habeas review is just like any other civil case. As this Court has observed, labeling habeas corpus proceedings as civil "is gross and inexact," since "[h]abeas corpus practice in the federal courts has conformed to civil practice only in a general sense." *Harris* v. *Nelson*, 394 U.S. 286, 293-294 (1969). "Essentially," the Court has noted, "the proceeding is unique." *Id.* at 294. While a habeas case is nominally civil, the proceeding "reviews a criminal punishment with the potential of overturning it," so that it "necessarily assumes part of the underlying case's criminal nature." *O'Brien* v. *Moore*, 395 F.3d 499, 505 (4th Cir. 2005).

Consistent with the unique character of habeas proceedings, the courts are far less constrained to follow the ordinary Civil Rules than petitioner suggests. Although Rule 11 of the Section 2254 Rules "*permits* application of the Federal Rules of Civil Procedure in habeas cases," *Mayle*, 125 S. Ct. at 2569 (emphasis added), it does so only "to the extent that [the civil rules] are not inconsistent with any statutory provisions or [the habeas] rules," *ibid.* (quoting Rule 11). Similarly, the Advisory Committee Notes stress that the Civil Rules are to be borrowed only "when in its discretion the court decides they are appropriate." Rule 11 of the Section 2254 Rules,

Advisory Committee Notes (1976). The Notes further emphasize that "[t]he court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus." *Ibid.* (Rule 11 "permits application of the civil rules only when it would be appropriate to do so").

The Section 2255 Rules, applicable to federal post-conviction motions, make even more clear the extent of discretion the courts possess to determine the appropriate procedural rule to apply. As originally adopted by Congress, Rule 12 provided that "[i]f no procedure is specifically prescribed by these rules, *the district court may proceed in any lawful manner not inconsistent with these rules*, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure." Rule 12 of the Section 2255 Rules (1976) (emphasis added).[9] Cf. *Frady*, 456 U.S. at 166-167 n.15 (interpreting Rule 12 of the Section 2255 Rules with reference to Rule 11 of the Section 2254 Rules).

In addition to its permissive language, the Advisory Committee Notes to Rule 11 are significant because they direct that courts should depart from the Civil Rules not only when those rules are inconsistent with a specific habeas rule or statutory provision, but also when they are "inconsistent or inequitable in the *overall framework of habeas corpus*." Rule 11 of the Section 2254 Rules, Advisory Committee Notes (1976) (emphasis added). This Court has embraced that admonition, see *Mayle*, 125 S. Ct. at 2569 (quoting "overall framework" language from Advisory Committee Notes); *Frady*, 456 U.S. at 168 n.15 (same), an understanding that is fundamentally inconsistent with petitioner's proposed analytical approach (Br. 20-21), pursuant to which the courts must presumptively apply the most analogous Federal Rule of Civil

[9] Although the language of Rule 12 was amended in 2004, after the district court's decision in this case, "the[] changes are intended to be stylistic and no substantive change is intended." Rule 12 of the Section 2255 Rules, Advisory Committee Notes (2004).

Procedure unless doing so would be inconsistent with a particular statutory provision or habeas rule.

In *Mayle*, for example, the Court did not set a standard of positive conflict between Federal Rule of Civil Procedure 15(c)(2)—regarding relation back of amendments to a complaint—and Rule 2(c) of the Section 2254 Rules or the AEDPA statute of limitations. Rather, the Court upheld limited application of Rule 15(c)(2) to habeas proceedings in a manner consistent with habeas principles, such as "AEDPA's 'finality' and 'federalism' concerns." *Mayle*, 125 S. Ct. at 2574. See *id.* at 2570 (noting that the majority of the courts of appeals had construed Rule 15(c)(2) "in federal habeas cases less broadly" in light of "Congress' decision to expedite collateral attacks by placing stringent time restrictions on [them]") (citation omitted).

In other situations, likewise, the Court has held certain civil rules inapplicable, or applicable in a modified fashion, in light of general habeas principles, rather than in reference solely to a particular rule or statute. See *Harris*, 394 U.S. at 293, 296 (Fed. R. Civ. P. 33, regarding discovery in civil actions, did not apply to habeas proceedings in light of "the history of habeas corpus procedure" and because civil discovery rules "are ill-suited to the special problems and character of such proceedings"); *O'Neal* v. *McAninch*, 513 U.S. 432, 440 (1995) (applying a criminal harmless-error standard in a habeas proceeding, because, "although habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake"); *Schlanger* v. *Seamans*, 401 U.S. 487, 490 n.4 (1971) (noting that national service of process, which is authorized in "civil actions" against federal officials under 28 U.S.C. 1391(e), is not authorized in a habeas proceeding, even though the statute does not explicitly exclude habeas proceedings).[10]

[10] Neither *Slack* v. *McDaniel*, 529 U.S. 473, 489 (2000), which petitioner cites (Br. 9) for the proposition that the Federal Rules of Civil Procedure are "applicable as a general matter to habeas cases," nor *Woodford* v. *Garceau*, 538 U.S. 202 (2003) (cited at Pet. Br. 20), is to the contrary. The Court did not

B. Applying Civil Rules 8(c) And 12(b) To Bar District Courts From Giving Effect To Limitations On Habeas Review Would Be Inconsistent With Habeas Principles

Application of Civil Rules 8(c) and 12(b) to habeas proceedings in the manner envisioned by petitioner would be "inconsistent * * * in the overall framework of habeas corpus." Rule 11 of the Section 2254 Rules, Advisory Committee Notes (1976). As previously discussed, see pp. 7-10, *supra*, because of the unique nature of habeas review, and the way in which it implicates principles of federalism, comity, and finality, Congress has assigned to the courts a distinctive role in enforcing appropriate limits on collateral review. Indeed, petitioner recognizes (Br. 13) there is no equivalent under the Civil Rules to the district court's responsibility as gatekeeper under 28 U.S.C. 2243 and Rule 4 of the Section 2254 Rules to dismiss *sua sponte* unmeritorious habeas petitions. While petitioner concedes (Br. 20) that Rules 8(c) and 12(b) of the Civil Rules must give way to the extent of an affirmative conflict with Rule 4, he maintains that Rules 8(c) and 12(b) apply to preclude any *sua sponte* action by the district court beyond

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discuss in either case what happens when there is tension between the Civil Rules and habeas principles. Indeed, in *Slack*, the Court emphasized the fact that the Civil Rules "vest the federal courts with due flexibility to prevent vexatious litigation," such as if a habeas petitioner injected undue delay by repeatedly bringing petitions with mixed exhausted and unexhausted claims. 529 U.S. at 489. That is entirely consistent with the authority exercised by the lower court here.

Nor do *Gonzalez* v. *Crosby*, 125 S. Ct. 2641 (2005), cited by petitioner at Br. 20 n.25, 32 & n.33, or *Lonchar* v. *Thomas*, 517 U.S. 314 (1996), relied on by petitioner at Br. 32-33, hold that application of the Civil Rules is to be measured solely against the text of the habeas statutes and rules. To the contrary, *Gonzalez* recognized that, in *Calderon*, the Court had rejected the Ninth Circuit's recall of its mandate as inconsistent with the federal rules and "the policies embodied in AEDPA," 125 S. Ct. at 2649, and in *Lonchar*, the Court rejected the district court's assertion of a "general 'equitable' power to create exceptions" to Rule 9(a) of the *Section 2254 Rules*, 517 U.S. at 316.

the explicit authority conferred by Rule 4 to dismiss petitions *sua sponte* before calling for a response by the State. But the "overall framework" of habeas cases posits a more active role for the courts, such that a court is not limited to the defenses asserted in the State's answer. There is, therefore, no general principle that a State's failure to raise an issue cuts off a habeas court's power to notice it.

1. Petitioner cites several of this Court's habeas decisions (Br. 15-16, 26) in support of the proposition that "affirmative defenses must be raised timely or else they are waived." *Id.* at 16. Notably, the purported "waiver" (or forfeiture) in those cases all concerned defenses that a State first raised, or the court first noticed, *after* proceedings in the district court had already been *completed* and the case was on appeal. See *Trest*, 522 U.S. at 89 (State had "neither raised nor argued" procedural default, even on appeal); *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (State raised non-retroactivity for the first time in its merits brief in the Supreme Court); *Collins* v. *Youngblood*, 497 U.S. 37, 40-41 (1990) (State had never asserted non-retroactivity defense and, when a member of this Court raised it *sua sponte* at oral argument, the State disclaimed reliance on it); *Granberry*, 481 U.S. at 135-136 (State interposed non-exhaustion for the first time on appeal). See also *Gray* v. *Netherland*, 518 U.S. 152, 165-166 (1996) (noting possibility of forfeiture with citation to *Schiro*, and *Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980) (State "failed to raise [procedural default] in either the District Court or the Court of Appeals")); *Banks* v. *Dretke*, 540 U.S. 668, 705 (2004) (noting possibility of forfeiture, with reliance on *Gray* and *Granberry*).

None of the cases relied upon by petitioner even suggests that forfeiture in habeas cases is to be determined with exclusive reference to the State's answer, let alone holds that a court is barred from noting a habeas defense *sua sponte* in the absence of an answer asserting it. In fact, several of this Court's decisions are directly contrary to any such narrow

limitation on the courts' authority. See, *e.g.*, *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994) ("a federal court may, but need not, decline to apply *Teague* if the State does not argue it"); *Schiro*, 510 U.S. at 229 (declining to address non-retroactivity defense that State raised only in Supreme Court merits brief, "[a]lthough we undoubtedly have the discretion to reach" the argument); *Granberry*, 481 U.S. at 134 (holding that State's failure, "whether inadvertently or otherwise," to raise nonexhaution in its answer did not preclude court of appeals from addressing it if "the interests of comity and federalism" warrant); *Jenkins*, 447 U.S. at 234 n.1 (exercising discretion not to address procedural default defense that State raised for the first time in the Supreme Court). Cf. *Trest*, 522 U.S. at 89-92 (holding there is no requirement that a court of appeals "*must* raise [procedural default] where the State itself does not do so," but declining to decide whether the court of appeals was permitted to raise the issue *sua sponte*); *Youngblood*, 497 U.S. at 41 (*Teague* non-retroactivity rule is not one the Supreme Court "*must* raise and decide * * * *sua sponte*" in light of State's affirmative representation that it "had chosen not to rely on *Teague*").

To the extent the Court's decisions suggest any general rule about when a State's defense to a habeas petition *might* be deemed forfeited, they emphasize the completion of district court proceedings, not the filing of the State's answer. See *Granberry*, 481 U.S. at 132 (noting reluctance to allow State "to withhold raising a defense until after the 'main event' —* * *, the proceeding in the District Court—is over"); *id.* at 135 ("if a full trial has been held in the district court * * *, it may * * * be appropriate for the court of appeals to hold that the nonexhaustion defense has been waived"); *Banks*, 540 U.S. at 705 (quoting same); *Kontrick* v. *Ryan*, 540 U.S. 443, 458 (2004) (defendant forfeited untimeliness argument "by failing to raise the issue until after [the] complaint was adjudicated on the merits").

2. Petitioner also urges importing Civil Rules 8(c) and 12(b) based upon Rule 5(b) of the Section 2254 Rules, which requires the State to include certain defenses in its answer. Pet. Br. 30. Although petitioner concedes that the statute of limitations was not among the affirmative defenses listed in Rule 5 at the time of the State's answer in this case, petitioner urges that the later addition of that defense was not a substantive change, and that Rule 5 is "[f]unctionally * * * the same as the mandatory language in Civil Rules 8 and 12, which gives rise to the waiver principle of the Civil Rules." *Ibid.*

This Court's decision in *Granberry* demonstrates that Rule 5 is not dispositive of the question whether the district court has the power to raise a defense when the State fails to assert it in its answer. At the time of the *Granberry* decision, Rule 5 specified only one affirmative defense that the State was required to address in the answer: "whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state." See 481 U.S. at 132 n.5; Rule 5 of the Section 2254 Rules (1976). This Court observed that the rule imposed on the State "a duty to advise the district court whether the prisoner has, in fact, exhausted all available state remedies." *Granberry*, 481 U.S. at 134. The Court nevertheless held that the court of appeals "is not obligated to regard the State's omission as an absolute waiver of the claim." *Id.* at 133. Rather, the appellate court should consider the interests of comity, federalism, and judicial efficiency, *id.* at 135, and decide "whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits of the petition forthwith," *id.* at 131. If an *appellate* court is free to reach a defense that was not asserted in the answer, then *a fortiori*, while a case is still pending in district court, that court is authorized to apply controlling legal principles despite the State's failure to comply with Rule 5. See *Caspari*, 510 U.S. at 389 (federal court

may apply non-retroactivity rule of *Teague*, though State does not argue it); *Schiro*, 510 U.S. at 228-229 (same). Cf. 28 U.S.C. 2243 para. 8 (district courts in habeas proceedings are empowered to "determine the facts, and dispose of the matter as law and justice require").

3. Petitioner's reliance on 28 U.S.C. 2254(b)(3) is similarly misplaced. Petitioner cites that provision, which provides that a "State shall not be deemed to have waived the exhaustion requirement * * * unless the State * * * expressly waives the requirement," *ibid.*, as support for the proposition that other defenses, as to which Congress has made no similar provision, are forfeited under more stringent rules that purportedly apply to civil cases generally. Pet. Br. 25. That statutory provision was not added to Section 2254 until AEDPA's enactment in 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1218, several years after this Court had already upheld, in *Granberry*, a court's authority to address an exhaustion defense despite the State's failure to raise it in its answer, 481 U.S. at 135. Thus, to the extent petitioner suggests that Section 2254(b)(3) supports the notion that strict forfeiture of defenses not timely raised in a habeas answer is the rule, absent an express statutory exception, *Granberry* refutes that suggestion.

Nor does Congress's adoption in Section 2254(b)(3) of an explicit rule with respect to waiver of the defense of exhaustion give rise to a negative inference that Congress intended to adopt a stricter rule of timely assertion or forfeiture with respect to other habeas defenses than the approach expressed in *Granberry*. There is no indication that, by establishing a *higher* threshold for inferring a State's waiver of the exhaustion requirement, Congress intended in AEDPA to make it *easier* for States to forfeit inadvertently the other limitations on habeas review. Rather, the amendment was specifically "designed to disapprove those decisions which have deemed states to have waived the exhaustion requirement, or barred them from relying on it, in circumstances other than where

the state has expressly waived the requirement." H.R. Rep. No. 23, 104th Cong., 1st Sess. 10 (1995). Thus, "[h]aving pinpointed the problem, [Congress] gave a pinpoint answer." *United States* v. *Vonn*, 535 U.S. 55, 71 (2002) (Congress's adoption of a harmless-error standard in Fed. R. Crim. P. 11(h) to respond to judicial holdings failing to conduct harmless-error review evinced no intent to displace plain-error review of forfeited claims).

4. Finally, strict enforcement of forfeiture principles derived from Rules 8(c) and 12(b) of the Civil Rules with respect to Section 2254 habeas petitions is inappropriate because it would introduce, based solely upon procedural technicalities, significant substantive disparities between habeas petitions under Section 2254 challenging state convictions and postconviction motions under Section 2255 to contest federal convictions. Although petitioner does not expressly state his rationale for urging application of Civil Rules 8(c) and 12(b) to Section 2254 proceedings, the implicit basis of his theory is that a habeas petition under Section 2254 is the equivalent of a civil complaint, and the State's response, if the court calls for one, is the equivalent of a defendant's answer. While that analogy is not entirely correct even with respect to Section 2254, it is even more inapt with respect to Section 2255.

Unlike a state prisoner seeking federal court review of his conviction, a federal prisoner does not initiate a new civil complaint in the district where he is incarcerated, but must file a motion under 28 U.S.C. 2255 in the district court that imposed his sentence. 28 U.S.C. 2255 para. 1. By the terms of the statute, a federal prisoner's filing is a motion to "set aside or correct the sentence," *ibid.*, which is a "further step in the movant's criminal case and not a separate civil action," Rule 1 of the Section 2255 Rules, Advisory Committee Notes (1976); *Frady*, 456 U.S. at 182 (Brennan, J., dissenting) (quoting S. Rep. No. 1526, 80th Cong., 2d Sess. 2 (1948)). Thus, Section 2255, unlike Section 2243, does not specifically call for an answer to the prisoner's motion, and Rule 5 of the Section

2255 Rules does not mention any requirement of raising affirmative defenses.

Rather than looking to Civil Rules 8(c) and 12(b) to fill any gap in the Section 2255 Rules, a court would likely look to practice regarding untimely motions to challenge a conviction or sentence under Rule 33 or Rule 35 of the Federal Rules of Criminal Procedure or a similar motion to amend a judgment under Federal Rule of Civil Procedure 60(b). Although the Court recently held, in *Eberhart* v. *United States*, 126 S. Ct. 403 (2005) (per curiam), that Rule 33's time limitation for filing a postconviction motion is "nonjurisdictional," *id.* at 405, such that it need not be noticed for the first time by an appellate court, *id.* at 407, the Court did not question that the district court itself, had it noticed the untimeliness, would have had authority to give effect to the time limitation before ruling on the Rule 33 motion, despite the government's failure to raise the defect. The same power exists for a district court to enforce *sua sponte* the AEDPA statute of limitations in a Section 2255 proceeding.

It would be anomalous for a significant difference between postconviction review of state and federal convictions to turn on technical distinctions in the procedural description of the two proceedings. Rather, in both contexts, the unique role of the postconviction court justifies judicial initiative in enforcing procedural limitations.

III. ALLOWING THE DISTRICT COURT TO RAISE THE STATUTE OF LIMITATIONS *SUA SPONTE*, EVEN AFTER AN ANSWER HAS BEEN FILED, DOES NOT CONFLICT WITH GENERAL PRACTICE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

Although Civil Rules 8(c) and 12(b) would be rendered inapplicable to habeas proceedings by habeas Rule 11 as "inconsistent * * * [with] the overall framework of habeas corpus," Rule 11 of the Section 2254 Rules, Advisory Committee Notes (1976), if they were as strict as petitioner maintains,

they are not in fact so limiting. Permitting the district court to raise AEDPA's statute of limitation *sua sponte* is not inconsistent with general principles of civil procedure.

Contrary to the implication of petitioner's arguments, a court with subject matter jurisdiction always has authority to apply the governing law. See *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (an appellate court "is not limited to the particular legal theories advanced by the parties but rather retains the independent power to identify and apply the proper construction of governing law"); *Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1990) (addressing a legal question that the parties had not argued).

Although, in ordinary civil cases, affirmative defenses generally must be raised in a first responsive pleading, see Fed. R. Civ. P. 8(c), "a defense may be raised in a number of ways even if the defense is not presented in the initial response." 2 James W. Moore, *Moore's Federal Practice* § 8.07[3], at 8-38 (3d ed. 2005). Under Rule 15(a) of the Federal Rules of Civil Procedure, leave of court to amend an answer "shall be freely given when justice so requires." See *Foman* v. *Davis*, 371 U.S. 178, 182 (1962) (in the absence of "undue delay, bad faith or dilatory motive," "repeated failure to cure deficiencies," "undue prejudice to the opposing party," or "futility of amendment," "the leave sought should, as the rules require, be 'freely given'"); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278, at 684-685 (3d ed. 2004). Because "[t]he purpose of [Rule 8(c)] is to give the opposing party notice of the [defense]" and a chance to rebut it, *Blonder-Tongue Labs., Inc.* v. *University of Ill. Found.*, 402 U.S. 313, 350 (1971), the courts of appeals have routinely upheld a district court's discretion to allow a late amendment, in the absence of prejudice to the opposing party or bad faith, to add affirmative defenses, including a statute of limitations defense. *E.g.*, *Williams* v. *Lampe*, 399 F.3d 867, 871 (7th Cir. 2005); *Commander Oil Corp.* v. *Barlo Equip. Corp.*, 215 F.3d 321, 333 (2d Cir.) (upholding discretion to

allow amendment despite defendant's "seven-year delay to add its statute of limitations defense"), cert. denied, 531 U.S. 979 (2000); *Zotos* v. *Lindbergh Sch. Dist.*, 121 F.3d 356, 360 (8th Cir. 1997); *Phelps* v. *McClellan*, 30 F.3d 658, 662 (6th Cir. 1994). Likewise, the habeas statute expressly provides that "[t]he return * * * may be amended, by leave of court, before or after being filed." 28 U.S.C. 2243 para. 7.

In addition to formal amendment, in ordinary civil practice, affirmative defenses may be raised for the first time by the district court *sua sponte* when it is done in a fashion that does not result in unfair surprise or prejudice to the plaintiff. See Moore, *supra*, § 8:07[2] and [3], at 8-36 to 8-41; *Grand Rapids Plastics, Inc.* v. *Lakian*, 188 F.3d 401, 407 (6th Cir. 1999) (*sua sponte* dismissal on statute of limitations grounds), cert. denied, 529 U.S. 1037 (2000); *Mowbray* v. *Cameron County*, 274 F.3d 269, 281 (5th Cir. 2001) (res judicata), cert. denied, 535 U.S. 1035 (2002); *Salahuddin* v. *Jones*, 992 F.2d 447 (2d Cir.) (same), cert. denied, 510 U.S. 992 (1993). Although petitioner urges the Court (Br. 30-31) to treat the State's failure to amend its pleading under Rule 15(a) as dispositive, no purpose would be served by insisting on that formality, especially in a context in which the courts concededly have express authority to dismiss *sua sponte* before an answer is filed. See *Bendolph*, 409 F.3d at 166 n.16 (a "federal habeas court acting *sua sponte* need not invite the government to amend an answer pursuant to Rule 15(a)"). Cf. *Moore* v. *McDonald*, 30 F.3d 616, 618 (5th Cir. 1994) (upholding *sua sponte* dismissal of *in forma pauperis* complaint as frivolous on statute of limitations grounds, citing 28 U.S.C. 1915(d) (1988)); *Street* v. *Vose*, 936 F.2d 38, 39 (1st Cir. 1991) (per curiam) (Breyer, C.J., presiding) (same), cert. denied, 502 U.S. 1063 (1992); *Ali* v. *Higgs*, 892 F.2d 438 (5th Cir. 1990) (citing 28 U.S.C. 1915(d) (1988), court of appeals dismissed complaint on statute of limitations grounds not raised or decided in district court). Moreover, any district judge who wished to enforce a limitations period that the State had not

raised would have to do no more than to invite a motion to amend the pleadings to raise the defense. Cf. *Carlisle* v. *United States*, 517 U.S. 416, 423-424 n.3 (1996) (same observation with respect to a motion for judgment of acquittal under Fed. R. Crim. P. 29(c)). The Court should not require such empty formalism.[11]

IV. A DISTRICT COURT SHOULD *SUA SPONTE* DISMISS A HABEAS PETITION AS UNTIMELY ABSENT ACTUAL PREJUDICE OR WASTE OF JUDICIAL RESOURCES

Of course, just because a court has the *authority* to raise a procedural bar *sua sponte* after the State has filed its answer does not mean that it should do so in every case. As the Third Circuit explained in *Bendolph*, *sua sponte* action by the district court after the government has responded should give the petitioner "notice of the issue and an opportunity to respond," and must "analyze[] the prejudice components of Rule 15(a)" to determine whether the petitioner would be prejudiced by the State's failure to assert the defense earlier. 409 F.3d at 169. Cf. *Castro* v. *United States*, 540 U.S. 375, 383 (2003) (recognizing court's *sua sponte* authority to rechar-

[11] Petitioner cites several cases for the proposition that "courts lack the authority to apply a waived limtations defense *sua sponte* in an ordinary civil case." Pet. Br. 13 & n.17. Those cases, from the Second, Fifth, Sixth, and Seventh Circuits, do not stand for any absolute rule that an unasserted affirmative defense cannot be raised by the court, as is clear from the cases cited in the text from those same circuits that *allow* the district courts to raise *sua sponte* such defenses in certain circumstances. Moreover, while the courts of appeals plainly frown on *sua sponte* dismissals that give the plaintiff no warning or opportunity to respond, see, *e.g.*, *Davis* v. *Bryc*[illegible], 810 F.2d 42, 44 (2d Cir. 1987) (*sua sponte* raising and deciding statute of limitations issue without notice to parties), or that come after the expenditure of considerable resources, *Haskell* v. *Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988) (three years of litigation and three published decisions), it is evident, from the cases cited in the previous paragraph, that those circuits do permit the raising of a statute of limitations post-answer by way of an amended answer. As indicated in the text, there is no reason to insist on that formality in this context.

acterize *pro se* litigant's motion as a first Section 2255 motion if it first provides notice and an opportunity to withdraw the motion). In some circumstances, such as after an extensive evidentiary hearing has already been held, the court might conclude that belatedly raising the statute of limitations would be inconsistent with the principles and policies that underlie the defense. Cf. *Haskell* v. *Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988) (reversing order allowing amendment of answer to add statute of limitations defense "[b]ecause of the length of time (over three years) and extensive litigation (three published decisions) between the filing of this action and the district court's *sua sponte* raising of the issue").

None of those concerns is present here. There is no claim that petitioner was prejudiced by the State's erroneous statement in its answer that the petition was timely. Nor is this the case of a State that made an affirmative determination "not to interpose [AEDPA's] limitation defense" for one or another reason. Pet. Br. 37. Cf. *Youngblood*, 497 U.S. at 40-41 (State affirmatively disavowed reliance on *Teague*). This is a case of forfeiture, not waiver. See note 2, *supra*. Here, the State's answer clearly did not "waive" the statute of limitations defense, in the sense of an "intentional relinquishment or abandonment of a known right." *Kontrick*, 540 U.S. at 458 n.13 (citation omitted). The State did not, for example, respond that the petition, though filed after AEDPA's one-year period, would be answered only on the merits. Rather, it is evident from the State's reference to "352 days of untolled time" having elapsed, J.A. 24, that the State was under the mistaken belief that the one-year limitations period had not run, a fact that is further demonstrated by the State's subsequent embrace of the untimeliness defense.

Nor did the omission of the defense in the State's answer result in unnecessary expenditure of effort and resources. The magistrate judge's order to show cause concerning the petition's untimeliness was the first thing that the magistrate

judge did in the case following receipt, in connection with the State's answer, of the court documents that were necessary to determine the date on which petitioner's state collateral appeal was no longer pending and the tolling of the habeas statute of limitations ceased. Thus, contrary to petitioner's contention (Br. 11), the district court's *sua sponte* dismissal undeniably furthered, rather than undermined, the goal of "quickly identify[ing] successful defenses and terminat[ing] the proceedings, saving time and expense for itself and the parties."

Accordingly, the court of appeals' conclusion that the district court retains its authority to raise *sua sponte* the issue of the statute of limitations in a habeas proceeding is consistent with a proper understanding of Civil Rules 8(c), 12(b), and 15(a), and it gives full effect to the important societal concerns at stake in habeas proceedings, as well as to the intent of Congress in enacting AEDPA's strict one-year time limit. See *Mayle*, 125 S. Ct. at 2575. Neither prejudice nor judicial efficiency concerns prevented the district court from exercising that power here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 04-1324

In the Supreme Court of the United States

PATRICK A. DAY,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF HABEAS CORPUS SCHOLARS JOHN BLUME, ERWIN CHEMERINSKY, ERIC FREEDMAN, RANDY HERTZ, JAMES LIEBMAN, IRA ROBBINS, AND LARRY YACKLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Rule 37.6, *Amici* certify that no counsel for a party authored this brief in whole or in part. This brief was written by undersigned counsel. No person or entity other than *Amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

[2] *See, e.g.*, John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. Rev. 271 (1996); Erwin Chemerinsky, *Federal Jurisdiction* (Aspen Law & Business 4th ed. 2003); Eric M. Freedman, *Habeas Corpus: Re-Thinking the Great Writ of Liberty* (N.Y.U. Press 2001); Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (Vols. 1 and 2) (all eds. (1st-4th) and all supps. (1989-2002)); Ira P. Robbins, *Habeas Corpus Checklists* (annual eds., 1993-2006); Larry Yackle, *Habeas Corpus* (2003).

SUMMARY OF ARGUMENT

Amici submit this brief in support of Petitioner Patrick Day. On November 29, 2004, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's ruling that Mr. Day's petition for a writ of habeas corpus was untimely under 28 U.S.C. § 2244(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (1996) ("AEDPA"). Although the State's answer to the habeas petition expressly conceded that the petition was timely filed, the district court nonetheless *sua sponte* raised the statute of limitations issue and dismissed the petition. In affirming, the Eleventh Circuit held that "[a] concession of timeliness by the state that is patently erroneous does not compromise the authority of a district court *sua sponte* to dismiss a habeas petition as untimely, under AEDPA." *Day v. Crosby*, 391 F.3d 1192, 1195 (11th Cir. 2004). The Eleventh Circuit further held that the failure to plead an affirmative defense in a habeas case does not constitute a waiver as it does in other civil cases. *Id.* at 1194. Mr. Day filed a petition for a writ of certiorari to this Court, which was granted on September 27, 2005.

Amici submit that the Court should reverse the Eleventh Circuit's ruling on the grounds that the State waived the statute of limitations defense and the lower court should not have raised the issue *sua sponte*. Under the Federal Rules of Civil Procedure, which should govern here, the statute of limitations is an affirmative defense that is waived by the defending party if not asserted in a timely manner. Thus, in civil cases, it is improper in most instances for a court to raise the affirmative defense of statute of limitations *sua sponte*. Rules of statutory construction support application of these principles to AEDPA. If Congress had intended to protect against waiver of the limitations defense under AEDPA, it could have explicitly so stated – as it did with respect to exhaustion of remedies. Moreover, important

historical principles and policy considerations weigh heavily against a court's *sua sponte* dismissal of a petition after the court has ordered filing of a responsive pleading. Because the statute of limitations is a departure from common law in the habeas context, the limitations provision should be read narrowly. Moreover, just as in ordinary civil cases, a rule providing for waiver and prohibiting *sua sponte* invocation of the limitations defense in the habeas context promotes the tenets of the adversarial system and the interests of finality and certainty. Finally, Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") does not authorize a departure from the manner in which a court treats the statute of limitations defense under the Federal Rules of Civil Procedure. Thus, after the court has required the State to answer the petition, the court no longer has the authority to dismiss *sua sponte*.

ARGUMENT

I. UNDER THE FEDERAL RULES OF CIVIL PROCEDURE, A PARTY WAIVES A STATUTE OF LIMITATIONS DEFENSE BY FAILING TO PLEAD IT AND A COURT ERRS BY RAISING THE DEFENSE *SUA SPONTE*

Under Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure, a party responding to a claim must assert all affirmative defenses in its responsive pleading. Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* § 5.20 (1985) (defendant must plead affirmative defense in answer so that plaintiff is aware of allegations and has an opportunity to prepare to meet them). Like all the defenses enumerated in Fed. R. Civ. P. 8(c), the statute of limitations defense is a non-jurisdictional affirmative defense. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *O'Neel v. Nat'l Ass'n of Sec. Dealers, Inc.*, 667 F.2d 804, 807 (9th Cir. 1982)

("We specifically renounce the contention that the defense of the statute of limitations goes to jurisdiction of the tribunal . . . ."). Generally, an affirmative defense that is not raised in the responsive pleading is waived. *See, e.g., Kropelnicki v. Siegel*, 290 F.3d 118, 130 n.7 (2d Cir. 2002) ("The statute of limitations is an affirmative defense that is waived if not raised."); *Day v. Liberty Nat'l Life Ins. Co.*, 122 F.3d 1012, 1015 (11th Cir. 1997) ("The statute of limitations is an affirmative defense which must be specifically pled . . . . [F]ailure to plead the bar of the statute of limitations constitutes a waiver of the defense."); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278, at 644 (3d ed. 2004) ("It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case . . . .").[3]

These principles are a critical component of the adversarial system, which requires the parties to a dispute, not the courts, to frame the issues to be litigated. *See United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").[4] These principles are particularly applicable to statutes of limitations, which protect the defending party against stale claims and

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[3] *See also Haskell v. Washington Twp.*, 864 F.2d 1266, 1273 (6th Cir. 1988) (failure to raise limitations defense in first responsive pleading constitutes waiver).

[4] *See also Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125, 1130 (7th Cir. 2003) (Cudahy, J., concurring in part and dissenting in part) ("Under ordinary principles of the adversary system, we do not reach out to decide questions not before us."), *cert. denied*, 541 U.S. 1043 (2004).

promote finality of cases in certain circumstances. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (statutes of limitations provide protection from stale claims).[5] Thus, the burden is properly placed on the defending party to assert a statute of limitations defense. *Id.* (statutes of limitations "put the adversary on notice to defend within a specified period of time").

Given these principles, a court should not correct a party's failure to plead an affirmative defense, such as the statute of limitations, by raising it *sua sponte*, because to do so would render waiver meaningless. *See Smith v. Horn*, 120 F.3d 400, 409 (3d Cir. 1997) (raising affirmative defense *sua sponte* puts court in "untenable position of ferreting out possible defenses upon which the state has never sought to rely" and makes judges come "dangerously close to acting as advocates for the state rather than as impartial magistrates"), *cert. denied*, 522 U.S. 1109 (1998); *Haskell v. Washington Twp.*, 864 F.2d 1266, 1273 (6th Cir. 1988) ("Since [the statute of limitations] is a waivable defense, it ordinarily is error for a district court to raise the issue *sua sponte*. Otherwise, the waiver aspect of Rule 8(c) would have little meaning." (citations omitted)).[6] *Amici* urge this Court to hold that these well-settled principles applicable to civil cases apply equally to cases arising under AEDPA.

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[5] *See also McGraw v. Matthaei*, 388 F. Supp. 84, 88-89 (E.D. Mich. 1972) (untimely raising of statute of limitations not allowed when extensive trial preparation and discovery had already taken place).

[6] *See also Hutcherson v. Lauderdale County, Tenn.*, 326 F.3d 747, 757 (6th Cir. 2003) ("Courts generally lack the ability to raise an affirmative defense sua sponte."); *Kropelnicki*, 290 F.3d at 130 n.7 ("[W]e have held that 'a district court "ordinarily" should not raise a statute of limitations defense *sua sponte*.'" (citation omitted)); *Hardiman v. Reynolds*, 971 F.2d 500, 502 (10th Cir. 1992) ("Generally, where the parties have not raised a defense, the court should not address the defense sua sponte.").

II. THE PRINCIPLES GOVERNING THE LIMITATIONS DEFENSE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE APPLY TO HABEAS CORPUS CASES

Rule 81(a)(2) of the Federal Rules of Civil Procedure states:

> These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

Similarly, Rule 11 of the Habeas Rules provides: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." This Court has confirmed that habeas cases are civil proceedings generally governed by the Federal Rules of Civil Procedure. Indeed, in *Banks v. Dretke*, 540 U.S. 668, 704-05 (2004), the Court held that Fed. R. Civ. P. 15(b), governing amendments to pleadings, applies in habeas cases. *See also Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 269 (1978) (habeas is civil proceeding governed by Federal Rules of Civil Procedure). Lower courts have adopted this principle. *See, e.g., Farmer v. Litscher*, 303 F.3d 840, 842-43 (7th Cir. 2002) (common understanding that habeas corpus cases are civil rather than criminal proceedings); *United States ex rel. Gaugler v. Brierley*, 477 F.2d 516, 523 (3d Cir. 1973) ("[F]ederal habeas corpus proceedings are *civil*, and not criminal, in nature. They are governed by the Federal Rules of Civil Procedure." (footnote omitted)). For the reasons set forth below, these principles apply to consideration of affirmative defenses, such as the statute of limitations, in

habeas cases and thus require timely assertion of such defenses to avoid waiver.[7]

A. AEDPA Does Not Preempt Application Of Federal Rule Of Civil Procedure 8(c) And Its Principles To Habeas Corpus Cases

Nothing in AEDPA suggests that Congress intended to depart from the basic federal rule that a statute of limitations defense is waived if it is not asserted timely and a court lacks authority to thereafter raise it *sua sponte*. The lower courts are in agreement that AEDPA's statutory limitations period is an affirmative defense. *See Nardi v. Stewart*, 354 F.3d 1134, 1140 (9th Cir. 2004) ("There is no dispute that AEDPA's statute of limitations is an affirmative defense."); *Jackson v. Sec'y for the Dep't of Corr.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (same).[8] Neither AEDPA nor its legislative history addresses assertion and waiver of the defense, nor are

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[7] This Court's recent decision in *Mayle v. Felix*, 125 S. Ct. 2562 (2005), reiterates the policy of applying the Federal Rules of Civil Procedure to habeas corpus cases. In *Mayle*, this Court rejected the petitioner's argument that Fed. R. Civ. P. 15(c)(2) should be interpreted more broadly in the habeas context than in ordinary civil proceedings, citing concerns that such an interpretation would undermine the purpose of AEDPA's statute of limitations. In so holding, this Court stated that its reading of Fed. R. Civ. P. 15(c)(2) in the habeas context "is consistent with the general application of Rule 15(c)(2) in civil cases, with Habeas Corpus Rule 2(c), and with AEDPA's installation of a tight time line for § 2254 petitions." *Id.* at 2574-75 (citations omitted). The policy that *Amici* advocate in the instant case, requiring the State to follow Fed. R. Civ. P. 8(c) and assert the statute of limitations defense in its responsive pleading, comports with this Court's holding in *Mayle*.

[8] *See also Scott v. Collins*, 286 F.3d 923, 927 (6th Cir. 2002) (same); *Carrington v. Robinson*, No. 99-CV-76377-DT, 2001 WL 558232, at *4 (E.D. Mich. Mar. 27, 2001) (same); *Acosta v. Artuz*, 221 F.3d 117, 121-22 (2d Cir. 2000) (same); *Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) (same).

there any provisions suggesting application of a different standard from that applied under Fed. R. Civ. P. 8(c). Thus, in a habeas case, just as in an ordinary civil case, a responding party must assert a statute of limitations defense in its responsive pleading, and failure to do so results in a waiver. *See Nardi*, 354 F.3d at 1141 (State must raise statute of limitations defense in order to avoid waiver); *Robinson v. Johnson*, 313 F.3d 128, 137 (3d Cir. 2002) (affirmative defenses under AEDPA should be treated the same as in other civil cases), *cert. denied*, 540 U.S. 826 (2003); *Scott v. Collins*, 286 F.3d 923, 927-30 (6th Cir. 2002) (failure to plead statute of limitations defense in habeas case results in waiver).[9] As explained in *Pino v. United States*, No. 98 Civ. 0092(RCC), 2004 WL 1320888 (S.D.N.Y. June 14, 2004), "'[p]arties are generally required to assert affirmative defenses early in litigation, so they may be relied upon, prejudice may be avoided, and judicial resources may be conserved. Habeas proceedings are no exception.'" *Id.* at *2 (quoting *Robinson*, 313 F.3d at 134); *see, e.g., Green v. United States*, 260 F.3d 78, 85 (2d Cir. 2001) ("the government expressly waive[d] its [AEDPA] statute of limitations defense by advocating a remand and 'suggesting' the conditions for that remand").

In *Robinson*, the Third Circuit explained why AEDPA's statute of limitations is waivable: "[B]ecause the AEDPA limitations period is subject to equitable modifications such as tolling, it is also subject to other

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[9] *See also Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (allowing for possibility of government waiver in finding that government did not waive its AEDPA statute of limitations defense); *Saucier v. Warden, N.H. State Prison*, 215 F.3d 1312 (table), No. 99-1345, 2000 WL 739713, at **1 (1st Cir. June 5, 2000) (unpublished) (same); *Samuel v. Duncan*, 92 F.3d 1194 (table), No. 95-56380, 1996 WL 413632, at **1 (9th Cir. July 22, 1996) (unpublished) (AEDPA statute of limitations defense can be waived); *Andrews v. Johnson*, 976 F. Supp. 527, 530 (N.D. Tex. 1997) (statute of limitations in habeas context is affirmative defense that is waived if not pleaded).

non-jurisdictional, equitable considerations, such as waiver." 313 F.3d at 134. The court went on to explain that "affirmative defenses under the AEDPA should be treated the same as affirmative defenses in other contexts, and, if not pleaded in the answer, they must be raised at the earliest practicable moment thereafter." *Id.* at 137. In so holding, the court reviewed several cases and concluded that the purpose of requiring parties to raise affirmative defenses early on was "not only to avoid prejudice, but also to promote judicial economy." *Id.*; *see also Grant v. Preferred Research, Inc.*, 885 F.2d 795, 797 (11th Cir. 1989) ("The Supreme Court has held that the purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it."); *Davis v. Bryan*, 810 F.2d 42, 44 (2d Cir. 1987) ("The statute of limitations is an affirmative defense under Fed. R. Civ. P. 8(c) that must be asserted in a party's responsive pleading 'at the earliest possible moment' and is a personal defense that is waived if not promptly pleaded." (citations omitted)). AEDPA's statute of limitations, like any other affirmative defense, must therefore be pleaded in the answer or at the earliest practicable moment thereafter. Otherwise, it is waived.

Furthermore, nothing in AEDPA overrides the corollary principle applied in civil cases that courts should not revive waived statute of limitations defenses by raising them *sua sponte*. Indeed, this Court has already made clear that *sua sponte* rulings in habeas cases are generally disfavored, both in cases in which the *sua sponte* ruling favored the State and in those in which the ruling favored the petitioner. In *Castro v. United States*, 540 U.S. 375, 383 (2003), for instance, the Court held that a lower court may not recharacterize a petitioner's motion as a motion for habeas relief without first notifying the petitioner of its intent to do so and giving the petitioner an opportunity to amend or withdraw the motion. Similarly, in *Calderon v. Thompson*, 523 U.S. 538 (1998), the Court reversed and remanded the Ninth

Circuit's *sua sponte* recall of its mandate denying habeas relief. Citing the State's interest in finality, the Court held that a court of appeals may not *sua sponte* recall a mandate unless it is to correct a "miscarriage of justice," a standard that was not met in *Calderon*. *Id.* at 558; *see also Pliler v. Ford*, 542 U.S. 225, 231 (2004) (court is not required to *sua sponte* warn petitioners of consequences of voluntarily dismissing their petitions, as "[d]istrict judges have no obligation to act as counsel or paralegal to *pro se* litigants").

This general principle applies equally to *sua sponte* dismissals on limitations grounds. In this case, the court's *sua sponte* dismissal on limitations grounds was particularly inappropriate given that the State not only failed to assert a statute of limitations defense, but affirmatively conceded the timeliness of the habeas petition. *See Scott v. Johnson*, 227 F.3d 260, 262-63 (5th Cir. 2000) (State's intentional waiver of procedural defense serves as a consideration against *sua sponte* invocation of procedural bar).

While this Court has not adopted a firm rule barring *sua sponte* dismissals based on failure to exhaust other remedies or procedural default, those defenses raise comity and federalism concerns not applicable to limitations defenses. For example, in *Granberry v. Greer*, 481 U.S. 129 (1987), the State raised the affirmative defense of exhaustion of remedies for the first time on appeal, and this Court held that in the "exceptional case" where the State fails to raise a nonexhaustion defense, the lower court should evaluate whether the interests of comity and federalism are better served by an immediate review of the merits or by first requiring state and district court proceedings before reviewing the merits. *Id.* at 134. The *Granberry* Court focused on the history of the exhaustion doctrine, which recognizes that state courts generally should have the first opportunity to consider a claim. *Id.* at 133-34 (the exhaustion doctrine is based on

the principle of comity, "'"a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist.'"'" (citations omitted)). Moreover, the Court rejected the appellate court's holding that the nonexhaustion defense could never be waived by the State, and instead favored a case-by-case determination of whether reaching the merits or requiring further state proceedings best served the interests of justice. *Id.* at 136.

Similarly, in *Trest v. Cain*, 522 U.S. 87, 89-90 (1997), this Court refused to reach the issue of whether a federal court of appeals could ever raise the procedural default defense *sua sponte*, but held that a court was not required to do so. The Court recognized that "'[i]n the habeas context, the application of the independent and adequate state ground doctrine,' of which a procedural default is typically an instance, 'is grounded in concerns of comity and federalism.'" *Id.* at 89 (quoting *Coleman v. Thompson*, 501 U.S. 722, 730 (1991)). As with the nonexhaustion defense in *Granberry*, *Trest* declined to hold that a procedural default defense could not be waived. *See id.* ("Thus, procedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.'" (quoting *Gray v. Netherland*, 518 U.S. 152, 166 (1996))).

Unlike the principles underlying failure to exhaust and procedural default defenses – that is, respect for the state courts and a desire not to prematurely decide what should first be a matter of state law – the statute of limitations defense does not implicate these concerns. Instead, timeliness is a straightforward defense that the State may choose to either invoke or waive. As discussed below, the principles governing the adversarial system and the compelling interest in finality support a finding that courts should not *sua sponte* dismiss a habeas

petition as untimely where the State has waived the statute of limitations defense.

B. The Statutory Construction Tenets Support Application Of Federal Rules Of Civil Procedure Principles To AEDPA's Statute Of Limitations

The language and legislative history of AEDPA lend further support to the conclusion that *sua sponte* dismissals on statute of limitations grounds are improper. If Congress intended to protect the State from waiving the statute of limitations defense in habeas cases, it would have expressly said so. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."). In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991), this Court reiterated the holding of *Mitsubishi* in interpreting Congress' intent with respect to the Age Discrimination in Employment Act of 1967 ("ADEA"). Here, because neither the plain language of AEDPA nor its legislative history suggests an intent to protect against waiver of the statute of limitations defense, Congress is presumed not to have intended to provide such protection. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) ("Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so. . . . The absence of this language in 28 U.S.C. § 1603(b) instructs us that Congress did not intend to disregard structural ownership rules."); *United States v. Naftalin*, 441 U.S. 768, 773 (1979) ("The short answer is that Congress did not write the statute that way.").

That Congress did not intend to make an exception to the normal rules regarding waiver of the

statute of limitations defense is buttressed by the fact that in another section of the statute, Congress expressly protected the State against inadvertent waiver of the affirmative defense of exhaustion of state remedies. Section 2254(b)(3) provides that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, *expressly waives* the requirement." 28 U.S.C. § 2254(b)(3) (emphasis added). Thus, Congress clearly knew how to alter the general rules of waiver to protect the State, and even did so expressly with respect to another procedural defense in habeas cases. Under basic rules of statutory construction, Congress' explicit protection of the State from inadvertent waiver of the exhaustion requirement and its failure to similarly protect the State from waiver of the statute of limitations defense indicates that Congress did not intend to provide such protection. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))); *accord Bates v. United States*, 522 U.S. 23, 29-30 (1997) (same); Norman J. Singer, *Statutes and Statutory Construction* § 47.25, at 327 (6th ed. rev. 2000) ("There is generally an inference that omissions are intentional. This rule is based on logic and common sense. It expresses the concept that when people say one thing they do not mean something else." (footnotes omitted)).

There are many examples where this Court and lower courts have applied this negative inference in refusing to read into a statute language that is not stated expressly. In *Lindh v. Murphy*, 521 U.S. 320 (1997), this Court, in construing AEDPA, interpreted "§ 107(c), expressly applying chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments

to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act." *Id.* at 327. The Court explained: "The insertion of § 107(c) with its different treatments of the two chapters [154 and 153] thus illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Id.* at 330; *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452-53 (2002) ("Where Congress wanted to provide for successor liability in the Coal Act, it did so explicitly, as demonstrated by other sections in the Act that give the option of attaching liability to 'successors' and 'successors in interest.'"); *Welzel v. Advocate Realty Invs., LLC (In re Welzel)*, 275 F.3d 1308, 1314 (11th Cir. 2001) (Congress' use of word "reasonable" with respect to one set of items but not another indicates that Congress acted purposefully in deciding whether to include or exclude reasonableness standard); *Trenkler v. United States*, 268 F.3d 16, 23 (1st Cir. 2001) ("the omission in § 2255 [of AEDPA] of the tolling language that is present in § 2244(d)(2) gives rise to a negative inference that the statute of limitations for § 2255 is not tolled while federal prisoners pursue other forms of post-conviction relief"); *Henderson v. Immigration & Naturalization Serv.*, 157 F.3d 106, 129-30 (2d Cir. 1998) ("Congress' use of explicitly retroactive language in that part of the bill [AEDPA § 413(g)], and its failure to employ any analogous language in the nearby and closely related § 440(d), by itself strongly indicates that Congress did not intend § 440(d) to apply retroactively."). Thus, the statutory construction of AEDPA supports application of Fed. R. Civ. P. 8(c) and its principles to AEDPA's statute of limitations.

C. Rule 4 Of The Habeas Rules Does Not Authorize A Court To Dismiss A Habeas Petition *Sua Sponte* After A Responsive Pleading Has Been Filed

The court of appeals erred in concluding that Rule 4 of the Habeas Rules ("Rule 4") authorizes a court to dismiss a petition *sua sponte* even after an answer has been filed. *Day v. Crosby*, 391 F.3d 1192, 1194-95 (11th Cir. 2004). Rule 4 provides in relevant part:

> If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition . . . . *If the petition is not dismissed,* the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.[10]

Rule 4 (emphasis added). The most logical reading of Rule 4 is that a court may dismiss *sua sponte* a facially deficient habeas petition brought under § 2254 *prior* to a responsive pleading being filed, but not after. The language of Rule 4 is sequential and expressly allows a court to dismiss *sua sponte* a habeas petition prior to ordering a responsive pleading.

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[10] *Amici* cite to the current version of the Rule, which was amended effective December 1, 2004. Notably, Congress could have amended Rule 4 in order to clarify any intent to give district courts a continuing power to dismiss *sua sponte* even after a responsive pleading is filed. *See Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. . . . This [approach] allows both of our branches to adhere to our respected, and respective, constitutional roles.").

In holding that a court may summarily dismiss a petition *sua sponte* even after requesting a responsive pleading, the Eleventh Circuit relied on inapposite cases that affirm a district court's power to dismiss a petition *prior* to answer.[11] There is nothing in Rule 4 that authorizes a court to dismiss *sua sponte* after the court has ordered the responsive pleading. To read absent words into the Rule "would result 'not [in] a construction'" of the Rule, "'but, in effect, an enlargement of it by the court.'" *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004) (citation omitted). Thus, under the rules of statutory construction discussed above, Rule 4 should be interpreted as allowing only that which it expressly authorizes. *See United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897) (legislative intent is found in the legislature's chosen language; "[n]o mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute"); *see also Lamie*, 540 U.S. at 534 (when a statute's language is plain, it is the court's duty to "'enforce it according to its terms'" (citations omitted)); *Lewis v. Barnhart*, 285 F.3d 1329, 1331-32 (11th Cir. 2002) ("'"[W]here the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent

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[11] *See Hill v. Braxton*, 277 F.3d 701, 706 (4th Cir. 2002) ("Our point is simply that when a federal habeas court, in its discretion, raises an affirmative defense before the state has even entered a responsive pleading, as the district court did here, it acts consistently with Rule 4."); *Herbst v. Cook*, 260 F.3d 1039, 1042 n.3 (9th Cir. 2001) ("The issue of waiver is irrelevant under the facts here, where the district court dismissed a petition *sua sponte* before the state ever filed a response."); *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000) (Rule 4 "give[s] the district court the power to review and dismiss habeas petitions prior to any responsive pleading by the state."); *Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) ("The district court has the power under Rule 4 to examine and dismiss frivolous habeas petitions prior to any answer or other pleading by the state.").

because we must presume that Congress said what it meant and meant what it said.'"'" (citations omitted)).[12]

The Advisory Committee Notes to Rule 4 support this interpretation, explaining that a district court is granted the initial power to dismiss *sua sponte* a facially deficient petition to "screen out frivolous petitions and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." *See* Rule 4 advisory committee's note (citing *Allen v. Perini*, 424 F.2d 134, 141 (1970)). Thus, the court fulfills the purpose of Rule 4 by dismissing any frivolous or facially invalid petition prior to ordering a responsive pleading. Allowing *sua sponte* dismissal after an answer has been filed would undermine the very purpose of Rule 4 by unnecessarily burdening a respondent with the filing of an answer.

The Courts of Appeals in both the Sixth and the Ninth Circuits have held that Rule 4 merely grants the courts an ability to dismiss a petition *sua sponte* as an initial matter. In *Scott v. Collins*, 286 F.3d 923 (6th Cir. 2002), a federal magistrate judge instructed respondent Collins to file a response addressing, among other issues, whether petitioner Scott's claims were barred by the one-year AEDPA statute of limitations. Collins filed a timely response that omitted any discussion of the statute of limitations defense. The magistrate judge then ordered

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[12] Nor is the language in Rule 4 allowing the court to "take other action the judge may order" intended to grant district courts the power to dismiss *sua sponte* after an answer is filed. Rather, this provision is "designed to afford the judge flexibility in a case where *either dismissal or an order to answer may be inappropriate.*" Rule 4 advisory committee's note (emphasis added). The Advisory Committee Notes make clear that "other action[s]" are those that "may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition," or those actions that might clarify or narrow a petition *prior* to an answer being filed. *Id.*

Scott to show cause why the court should not dismiss his petition as time-barred. The district court found Scott's response to the show cause order inadequate, and dismissed his petition with prejudice based on its untimeliness. Scott appealed to the Sixth Circuit after the district court granted a certificate of appealability on the issue of whether the statute of limitations barred his habeas petition. *Id.* at 925-26.

In deciding whether Scott's petition was barred, the Sixth Circuit engaged in a two-part analysis. First, the court determined that Collins had waived the statute of limitations defense by failing to plead it in his answer. The court reasoned that the one-year AEDPA statute of limitations defense is no different from any other affirmative defense, and a party must therefore raise the defense in its first responsive pleading in order to avoid waiver. *Id.* at 927-28.

Second, the Sixth Circuit examined whether a district court may *sua sponte* cure a waiver of the statute of limitations defense. The court held that Rule 4 permits a district court to dismiss *sua sponte* as an "initial matter . . . if it plainly appears from the face of the petition that the petitioner is not entitled to relief." *Id.* at 929-30. The court further held, however, that "Rule 4's use of the word 'otherwise' indicates that, if, after prompt examination, a judge does not summarily dismiss the case, the judge must order respondent to either file an answer or take other appropriate action." *Id.* at 930. Thus, the court's power to summarily dismiss a petition *sua sponte* "expires" upon requesting an answer, so that *sua sponte* dismissal after this point would constitute an "impermissible curing of the respondent's waiver." *Id.*

In *Nardi v. Stewart*, 354 F.3d 1134 (9th Cir. 2004), the Ninth Circuit adopted the reasoning of the *Collins* court in concluding that a court's power to dismiss *sua sponte* expires after it requests an answer or other

responsive pleading. After reviewing petitioner Nardi's habeas petition, the district court required the State to file an answer. The district court specifically invited the State to address the timeliness of Nardi's petition. The State's answer merely addressed the merits of Nardi's claims and failed to challenge the timeliness of his petition even though the petition was filed well after the statute of limitations had expired. The district court, adopting the magistrate's recommendation, dismissed Nardi's petition based on its untimeliness, reasoning that the State was "'not deemed to have waived the limitations period unless expressly waived.'" *Id.* at 1136.

The Ninth Circuit reversed, holding that the State's failure to raise the statute of limitations in its answer was an effective waiver of the defense that precluded the district court from dismissing the petition as untimely. As in *Collins*, the Ninth Circuit recognized the AEDPA statute of limitations as an affirmative defense that must be pleaded in order to avoid waiver. The court noted that prior to the State's filing a response, a district court "'has the authority to exercise its discretion by raising the statute of limitations *sua sponte* when doing so furthers the interests of comity, federalism, and judicial efficiency.'" *Id.* at 1141 (quoting *Herbst v. Cook*, 260 F.3d 1039, 1042 n.3 (9th Cir. 2001)). The court held, however, that the language of Rule 4 "does *not* authorize a court to dismiss the petition *sua sponte* after ordering respondent to file an answer." *Id.* A post-answer dismissal on the basis of a waived statute of limitations defense would therefore constitute an "'impermissible curing of the respondent's waiver.'" *Id.* at 1142 (quoting *Collins*, 286 F.3d at 930).

The *Collins* and *Nardi* opinions adopt a logical and straightforward reading of Rule 4 that is consistent with Federal Rules of Civil Procedure principles and the statutory construction of AEDPA. The text and Advisory Committee Notes of Rule 4 make clear that a court's

power to dismiss *sua sponte* expires upon requesting the filing of a responsive pleading. An alternative reading that permits a court to subsequently dismiss *sua sponte* reads absent words into the Rule and constitutes unwarranted enlargement of the court's power. *Lamie*, 540 U.S. at 538.

D. Historical Principles And Policy Considerations Disfavor Dismissal Of A Habeas Petition *Sua Sponte* After A Responsive Pleading Has Been Filed

Historical principles and policy considerations counsel against dismissal of a habeas petition *sua sponte* after a responsive pleading has been filed with the court. These considerations include: (1) common law rules treating the statute of limitations as a waivable affirmative defense; (2) the essential nature of the adversarial system; (3) the parties' interests in finality and certainty; and (4) the historical significance of the writ of habeas corpus.

At common law, there was no statute of limitations applicable to habeas claims, a principle that was recognized by this Court. *United States v. Smith*, 331 U.S. 469, 475 (1947) ("*[H]abeas corpus* provides a remedy . . . without limit of time."); *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) ("Congress has yet to create a statute of limitations for federal habeas corpus actions.").[13] In 1996, however, for the first time, AEDPA established a one-year statute of limitations for habeas petitions. *See Brown v. Angelone*, 150 F.3d 370, 371 (4th Cir. 1998). In the Congressional debate over

[13] Although Rule 9(a) of the Habeas Rules had permitted a district court to dismiss a petition under certain circumstances if the State proved prejudice by delay in filing the petition, this Court found that a prisoner's six-year delay in filing a habeas petition did not violate Rule 9(a). *See Lonchar v. Thomas*, 517 U.S. 314, 326-28 (1996).

AEDPA's statute of limitations provision, Representative Pelosi noted the drastic impact of this significant departure from the common law: "For the first time, a use it or lose it approach is being applied to a basic constitutional right. Constitutional rights are not time-bound, they are timeless or they are worthless." 142 Cong. Rec. H3614 (daily ed. Apr. 18, 1996). Moreover, unlike other provisions of AEDPA, such as the successive-petition and evidentiary hearing provisions,[14] which were enacted after development of a consistent body of common law on the topic, the statute of limitations on habeas corpus petitions was a pure legislative creation – orphaned from any common law supporting a time limitation for habeas.

But that was as far as Congress went. As discussed in section II.B *supra*, there is no language in AEDPA indicating that Congress also sought to depart from the common law rules treating the statute of limitations as a waivable affirmative defense. As such, AEDPA's statute of limitations must be interpreted narrowly. *See* Norman J. Singer, *Statutes and Statutory Construction* § 50.01, at 140 (6th ed. rev. 2000) ("Absent an indication that the legislature intends a statute to supplant common law, the courts should not give it that effect." (footnote omitted)).

As this Court has recognized since 1879: "No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw v. R.R. Co.*, 101 U.S. 557, 565 (1879). The Court has emphasized that "[i]t is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.'" *Norfolk Redevelopment & Hous. Auth. v.*

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[14] 28 U.S.C. § 2244(b)(3)(A) and § 2254(e)(2), respectively.

Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35-36 (1983) (citations omitted).[15] Thus, an expansive interpretation of the AEDPA statute of limitations as an unwaivable defense simply is not warranted.

Respect for the proper functioning of our adversarial system is another consideration that weighs heavily against permitting a court to *sua sponte* dismiss a petition after the court requests filing of a responsive pleading. As discussed in section I *supra*, the defining feature of our adversarial system is that parties to a dispute, rather than the courts, are responsible for framing the issues to be litigated. *See United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring); *see also Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions *presented and argued by the parties* before them." (emphasis added)); *Lewis v. New York*, 547 F.2d 4, 5 (2d Cir. 1976) ("It is prudent for judges to avoid the inquisitorial role, and *not search out issues* more appropriately left to a motion by the opposing party." (emphasis added)). A court acts in a manner consistent with the essential nature of an adversarial system when it limits its review to affirmative defenses raised by a party in its responsive pleading. However, a court that attempts to cure a State's omission of the statute of limitations defense from its responsive pleading "come[s] dangerously close to acting as [an] advocate[] for the state" rather than as an "impartial" judge of an adversarial proceeding. *See Smith v. Horn*, 120 F.3d 400, 409 (3d Cir. 1997).

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[15] *See, e.g., Fleet Nat'l Bank v. Valente (In re Valente)*, 360 F.3d 256, 261 (1st Cir. 2004) ("[T]o find broad preemption in the UFTA, in the absence of language of preemption, would be at odds with the presumption that statutes should not be construed to alter common law principles absent an explicit statement of legislative intent to do so.").

The parties' interests in finality and certainty also disfavor recognizing a court's power to dismiss a petition *sua sponte* after ordering the filing of a responsive pleading. Interpreting Rule 4 in the manner set forth in section II.C *supra* promotes clarity and certainty for both a habeas petitioner and the State. A court has the initial power to dismiss a deficient petition. Should the court choose not to dismiss and instead request a responsive pleading, the pleading will put the petitioner on certain notice of what, if any, affirmative defenses the petitioner must address and contend with. The State is also on notice that it must carefully present any and all of its affirmative defense arguments in its responsive pleading. Granting a court the power to dismiss a petition on statute of limitations grounds at any time would unsettle the expectations of both parties and strip the process of necessary predictability. *See Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

Finally, the importance of the writ of habeas corpus also counsels in favor of interpreting the statute of limitations narrowly. The right of habeas corpus, as a facet of American law, is as old as our Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. The right to petition for a writ of habeas corpus has been a federal statutory right for nearly as long. *See* Judiciary Act of 1789, ch. 20 § 14, 1 Stat. 81 (1845); 28 U.S.C. § 2254(a). Because of the significance of the writ, this Court has recognized the importance of allowing a defendant the opportunity for one round of federal review: "Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869) (the writ "has been for centuries esteemed the best and only

sufficient defence of personal freedom")). Thus, rules that operate to limit a petitioner's right to initial habeas review should be examined with heightened scrutiny.

CONCLUSION

For all of the reasons set forth above, *Amici* respectfully request that this Court reverse the ruling of the Eleventh Circuit and grant Mr. Day's petition for a writ of habeas corpus.

Respectfully submitted,

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CLERK

IN THE

Supreme Court of the United States

PATRICK A. DAY,
Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* CIVIL PROCEDURE AND FEDERAL COURTS PROFESSORS JANET COOPER ALEXANDER, BARBARA ALLEN BABCOCK, SHERI ENGELKEN, RICHARD FREER, TYLER T. OCHOA, MALLA POLLACK, LAUREN ROBEL, SUZANNA SHERRY, MICHAEL SOLIMINE, A. BENJAMIN SPENCER, ADAM N. STEINMAN, AND GEORGENE VAIRO SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the State waives a limitations defense to a habeas corpus petition when it fails to plead or otherwise raise that defense and expressly concedes that the petition was timely?

2. Whether Habeas Rule 4 permits a district court to dismiss a habeas petition *sua sponte* after the State has filed an answer based on a ground not raised in the answer?

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IN THE

Supreme Court of the United States

No. 04-1324

PATRICK A. DAY,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* CIVIL PROCEDURE AND FEDERAL COURTS PROFESSORS JANET COOPER ALEXANDER, BARBARA ALLEN BABCOCK, SHERI ENGELKEN, RICHARD FREER, TYLER T. OCHOA, MALLA POLLACK, LAUREN ROBEL, SUZANNA SHERRY, MICHAEL SOLIMINE, A. BENJAMIN SPENCER, ADAM N. STEINMAN, AND GEORGENE VAIRO SUPPORTING PETITIONER

INTEREST OF *AMICI CURIAE*

This case concerns whether, in a habeas corpus case, a court may raise an affirmative defense—that the statute of limitations has expired—*sua sponte* after the State has filed

its answer. *Amici curiae* are law professors in the area of civil procedure and federal courts.[1] As scholars and commentators in the field, *amici* have a unique perspective on the application of the Federal Rules of Civil Procedure and related rules, as well as a strong interest in ensuring their consistent and evenhanded interpretation.

Janet Cooper Alexander is the Frederick I. Richman Professor of Law at Stanford Law School. Professor Alexander teaches in the areas of advanced civil procedure, complex litigation, conflict and dispute resolution, and federal courts. She has published important articles on class actions and securities and has also delivered several speeches on procedural issues.

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Sheri Engelken is an Assistant Professor at Gonzaga University School of Law. She teaches in the areas of civil procedure, constitutional law, intellectual property, and professional responsibility. She was a federal court litigator for nineteen years before entering academia. She has delivered speeches and presentations on numerous federal practice issues.

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[1] This *amicus* brief is filed with the consent of the parties, and letters of consent are being filed with the Clerk of the Court in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amici* submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

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Lauren Robel is the Dean and the Van Nolan Professor of Law at Indiana University School of Law, where her teaching focuses on both civil procedure and federal courts. Dean Robel has published several books and other scholarly works on civil litigation. She has served for over ten years as a member of the Rules Committee of the Indiana Supreme Court, and as a member of the Rules Committee for the United States District Court for the Southern District of Indiana. Dean Robel has also served as a member of the Advisory Committee on Circuit Rules for the United States Court of Appeals for the Seventh Circuit.

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SUMMARY OF ARGUMENT

I. This case concerns a fundamental question in our system of justice: the circumstances under which a court

may, *sua sponte*, raise an affirmative defense that the defendant itself has not raised. Because our system of justice is adversarial, the parties to a case ordinarily have the burden of pressing their positions—claims and defenses—within the adjudicatory framework established by the Federal Rules of Civil Procedure. The courts, by contrast, play the detached role of neutral arbiter. Consequently, a party's failure to assert an affirmative defense ordinarily results in its waiver or forfeiture. It is not the role of the courts to litigate the case on behalf of one party or another by raising claims or defenses the party itself has omitted, much less issues that, as here, the party conceded. Indeed, the judge who does so risks assuming the role—or appearing to have assumed the role—of advocate, threatening the appearance of neutrality that is critical to public faith in the judiciary.

II. In limited circumstances, courts may assert otherwise waived defenses (or raise otherwise waived claims) *sua sponte*. But those circumstances are wholly absent here.

A. First, courts may raise defenses *sua sponte* where Congress has, by statute, obligated them to do so. But Congress did not impose such a departure from the ordinary allocation of responsibilities between courts and parties for the statute of limitations defense at issue in this case. To the contrary, to the extent the habeas rules contemplate a limited departure from the ordinary, party-driven, adversarial approach—for example, by requiring judges to review a complaint for adequacy in the first instance—the habeas rules expressly limit that departure to the period *before* answer. Here, the district court sought to raise an issue favoring the State *after* answer.

B. In addition, courts may (and sometimes must) raise omitted defenses if they implicate values that transcend the concerns of the parties. For example, courts may always raise subject-matter jurisdiction *sua sponte* (as the Federal Rules of Civil Procedure make clear), as it implicates

separation of powers concerns independent of the parties' interests. Statutes of limitations, by contrast, generally do not implicate concerns beyond the interests of the parties. Ubiquitous in the law, they generally provide a right of repose that inheres in the defendant—not in the judicial system or non-parties. As a result, they are subject to waiver or assertion at the defendant's discretion. There is no compelling reason to depart from that ordinary rule here.

ARGUMENT

There are few principles more familiar in litigation than the rule that failure to raise a claim or non-jurisdictional defense—like the statute of limitations defense at issue here—results in its forfeiture or waiver. That principle is inherent in our adversary system of justice, which relies on the parties rather than the courts to frame the issues. It is embedded in the Federal Rules of Civil Procedure. And it is a feature of the procedural rules of virtually every State. The universality of the rule is hardly surprising. When judges unnecessarily assume the burden of raising arguments and defenses for parties that have not raised those matters themselves, judges do not merely displace our adversary system with one that is more inquisitorial in nature. They also risk assuming or appearing to assume the role of advocate, compromising the appearance of judicial neutrality that is at the heart of our judicial system and a source of public confidence therein.

Nothing in the Rules Governing Section 2254 Cases (the "Habeas Rules") suggests that Congress intended to weaken the ordinary rules of waiver when addressing the statute of limitations for habeas cases. To the contrary, the text of the habeas rules reinforces the applicability of ordinary waiver rules. Although Congress expressly altered the rules of waiver and forfeiture for some issues (such as exhaustion), it did not modify those rules for the statute of

limitations. And to the extent Congress departed from the adversarial model by requiring judges to screen habeas petitions for plain defects in the first instance, Congress carefully circumscribed that departure by limiting it to the period before answer. Finally, none of the ordinary exceptions to the general principles of waiver or forfeiture apply here.

I. COURTS ORDINARILY SHOULD NOT RAISE, *SUA SPONTE*, NON-JURISDICTIONAL STATUTE-OF-LIMITATIONS DEFENSES

A. The Failure To Raise An Affirmative Defense Usually Waives That Defense

The principles of waiver and forfeiture resonate throughout our system of justice. Because our adversary system relies on the parties—not the courts—to frame the issues and present their claims and defenses, it has long been the rule that the failure to press a claim or defense results in its forfeiture. See, *e.g.*, *Geyer's Lessee* v. *Irwin*, 4 U.S. 107, 107 (1790) (the failure of the defendant and his attorney to "suggest[] the privilege, as an objection to the trial of the cause," "amounts to a waiver, by which the party is forever concluded"); *Yeaton* v. *Lynn*, 30 U.S. (5 Pet.) 224, 232 (1831) ("[T]he revocation * * * not having been pleaded, could not be given in evidence"). This Court has, "'in the context of a broad array of constitutional and statutory provisions,' articulated a general rule that presumes the availability of waiver." *New York* v. *Hill*, 528 U.S. 110, 114 (2000).

Statute-of-limitations defenses in particular have long been subject to waiver. Over a century ago, this Court expressly recognized that a limitations period ordinarily "does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions." *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887); see also, Note, *Traer* v. *Clews*, 115 U.S. 528, 542 (1885) ("The statute of

limitations, as a defense to an action, must be pleaded, or it will be considered waived by the defendant. * * * In absence of [a] statutory provision to the contrary, where parties to a suit fail at the proper time to interpose the defense of bar by the statute of limitations, it cannot be afterwards made available.").

Reflecting those principles, the Federal Rules of Civil Procedure expressly require defendants to plead their affirmative defenses—and statutes of limitations in particular. Rule 8(b) provides that each "party shall state in short and plain terms the party's defenses to each claim asserted." Fed. R. Civ. P. 8(b). Reinforcing that requirement, Rule 8(c)—entitled "Affirmative Defenses"—specifies that certain defenses "shall [be] set forth affirmatively" by the party, including the defenses of "statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." Fed. R. Civ. P. 8(c).

Rule 12(b), in turn, makes it clear that the *answer* must include every defense (except seven enumerated defenses such as failure to state a claim, improper venue, and lack of jurisdiction, which may be made by motion). "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto." Fed. R. Civ. P. 12(b). This Court ordinarily accepts "the proposition that '[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'" *Christensen* v. *Harris County*, 529 U.S. 576, 583 (2000). Affirmative defenses thus must be set forth as required by Rules 8(b), 8(c) and 12(b)—or they may not be asserted at all. As Wright and Miller observes, "it is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense." 5 Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 1278, at 644-645 (3d ed. 2004).

The same rule finds "virtually universal acceptance" in the procedural requirements of the States as well. See, *e.g.*, *Patrick* v. *Tuscaloosa County Comm'n*, 816 So. 2d 46, 51 (Ala. Civ. App. 2001) (A "statute of limitations is an affirmative defense * * * ; generally, an affirmative defense that is not pleaded when the answer is filed is deemed to have been waived."); *Uyleman* v. *D.S. Rentco*, 981 P.2d 1081, 1083 (Ariz. Ct. App. 1999) ("[T]he statute of limitations is an affirmative defense that is waived unless raised."); *Zertuche* v. *Montgomery, Ward & Co., Inc.*, 706 P.2d 424, 426 (Colo. Ct. App. 1985) ("The statute of limitations is an affirmative defense which is waived unless affirmatively pleaded."); *Lobrillo* v. *Brokken*, 837 So. 2d 1059, 1060-1061 (Fla. Dist. Ct. App. 2002) (trial court erred in considering limitations defense where defendant did not raise it because the "[s]tatute of limitations is an affirmative defense that must be specifically pled in the answer"); *Cole* v. *State*, 15 P.3d 820, 823 (Idaho 2000) ("[T]he statute of limitations is an affirmative defense that may be waived if it is not pleaded by the defendant."); *Porter* v. *Good Eavespouting*, 505 N.W.2d 178, 182 (Iowa 1993) ("Defendants have a duty to plead the statute of limitations if they wish to rely on it."); *Alexander* v. *Womack*, 857 So. 2d 59, 62 (Miss. 2003) ("[T]he statute of limitations is an affirmative defense which must be pled. If a party intends to rely on [it], he must affirmatively plead it * * * ."); *Maria's Healthcare Servs., Inc.* v. *Turenne*, 28 P.3d 491, 494 (Mont. 2001) ("A statute of limitations defense is an affirmative defense that is waived if it is not raised in the answer to a claim."); *Manker* v. *Manker*, 644 N.W.2d 522, 531 (Neb. 2002) ("The statute of limitations is an affirmative defense which is waived if not asserted by demurrer or answer."); *In re Interest of K.B.*, 490 N.W.2d 715, 717 (N.D. 1992) ("[A] statute of limitations in a civil proceeding is an affirmative

defense. Affirmative defenses are waived if not pleaded."); *State ex rel. Jones* v. *Suster*, 701 N.E.2d 1002, 1007–1008 (Ohio 1998) ("A statute of limitations is an affirmative defense that is waived unless pled in a timely manner."); *Furr* v. *Thomas*, 817 P.2d 1268, 1272–1273 (Okla. 1991) ("[S]tatutes of limitation must be pled as an affirmative defense. Failure to plead an affirmative defense operates as a waiver of that defense."); *Bowden* v. *Gofax, Inc.*, 776 A.2d 1066, 1066–1067 (R.I. 2001) ("The failure to plead the affirmative defense of statute of limitations results in its waiver."); *In re Estate of Peters*, 765 A.2d 468, 473–474 (Vt. 2000) ("Failure to plead statute of limitations as an affirmative defense in an answer or appropriate motion means that it is waived."); *Jones* v. *Jones*, 457 S.E.2d 365, 369 (Va. 1995) (failure to raise statute of limitations as an affirmative defense in a responsive pleading results in waiver); *Haywood* v. *Aranda*, 19 P.3d 406, 410 n.8 (Wash. 2001) (failure to raise statute of limitations in accordance with Civil Rule 8(c) results in waiver); *Kofler* v. *Florence*, 573 N.W.2d 568, 571 (Wis. Ct. App. 1997) ("It is well-settled law that the affirmative defense of statute of limitations must be raised * * * or be deemed waived.").[2]

[2] See also *Custer* v. *Plan Comm'n of City of Garrett*, 699 N.E.2d 793, 795 (Ind. Ct. App. 1998) ("Indiana Trial Rule 8(C) provides that '[a] responsive pleading shall set forth affirmatively and carry the burden of proving * * * statute of limitations * * *.' It is generally true that an affirmative defense is waived by failure to raise it in the pleadings."); *O'Donnell* v. *Fletcher*, 681 P.2d 1074, 1076 (Kan. Ct. App. 1984) ("Since defendant failed to appear or plead the statute as a defense, the statute of limitations was waived."); *Bagwell* v. *Peninsula Reg'l Med. Ctr.*, 665 A.2d 297, 316 (Md. Ct. Spec. App. 1995) ("[T]he statute of limitations is an affirmative defense that must be included in the answer."); *Blue Spruce Co.* v. *Parent*, 365 A.2d 797, 801 (Me. 1976) (affirmative defense waived if not pleaded); *Rhee* v. *Golden Home Builders, Inc.*, 617 N.W.2d 618, 621 (Minn. Ct. App. 2000) (similar); *Coastal Oil New England, Inc.* v. *Citizens Fuels Corp.*, 644 N.E.2d 258, 260 n.3 (Mass. App. Ct. 1995) ("A party is required to plead the affirmative defense of statute of limitations in its answer."); *Saffian* v. *Simmons*, 704 N.W.2d 722, 726 (Mich. Ct. App. 2005) ("A statute of limitations defense must be raised in a defendant's first responsive pleading or in a motion filed before that pleading."); *State, Univ. & Cmty. Coll. Sys.* v. *Sutton*, 103 P.3d 8, 18 (Nev. 2004) (similar); *Berry* v. *Meadows*, 713 P.2d 1017, 1024 (N.M. Ct. App. 1986) (similar); *Fade* v. *Pugliani/Fade*, 779 N.Y.S.2d 568, 570 (N.Y. App. Div. 2004) (similar); *Robinson* v. *Powell*, 500 S.E.2d 714, 717 (N.C. 1998) (similar); *Wolff* v. *Sec'y of the S.D. Game, Fish and Parks Dep't*, 544 N.W.2d 531, 533–534 (S.D. 1996) ("Under SDCL 15-6-8(c), a party's pleadings must affirmatively set forth matters constituting an avoidance or affirmative defense. If such an affirmative defense is not pleaded, it is waived."); *In re B.A.C.*, 144 S.W.3d 8, 12 (Tex. Ct. App. 2004) (similar); *Brown & Root Indus. Servs.* v. *Indus. Comm'n of Utah*, 947 P.2d 671, 677 (Utah 1997) ("Statute of limitations defenses are affirmative defenses and are waived unless properly raised.").

B. Courts Should Depart From Our Adversarial Model By Raising Waived Issues *Sua Sponte* Only In Very Limited Circumstances

The nearly universal rule that affirmative defenses (like statutes of limitations) are waived unless pleaded reflects the adversarial nature of our system of justice. "The rule that points of law not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring). Two features set our system of adversarial justice apart from the inquisitorial model: (1) the parties are the masters of the litigation, and (2) the judge is a more neutral and passive actor. Stephan Landsman, *The Adversary System* 1 (American Enterprise Institute 1984); see also Gerald Walpin, *America's Adversarial and Jury Systems: More Likely to do Justice*, 26 Harv. J.L. & Pub. Pol'y 175, 176 (2003). As this Court has observed, our "system [is] adversarial rather than inquisitorial" because it includes

"a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con *adduced by the parties*." *McNeil* v. *Wisconsin*, 501 U.S. 171, 181 n.2 (1991) (emphasis added).[3]

The adversarial model—party-driven litigation with a neutral judge—serves important interests. It is, in the first instance, more likely to achieve correct and just results. "Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro* v. *United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring). In fact, the "very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U.S. 853, 862 (1975). It is also efficient, because it places the burden of identifying the issues on the parties, who not only outnumber the judges,

[3] See also *Carducci* v. *Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."). The concept of party-driven dispute resolution, of course, predates our civilized system of justice. In the middle ages, when disputes were resolved by trial by battle, trial by ordeal, or wager of law, the parties to the controversy were charged with representing and defending their own interests. Landsman, *supra*, at 2–4. Generally, trial by battle required disputing parties to physically battle until one of the sides yielded; trial by ordeal required that a litigant carry out an ordeal; and wager of law required that one of the litigants swear an oath that his claims were true as well as produce other persons to support his oath or to make their own oaths. *Id.* at 8–9. A common feature of these medieval methods was that the parties to the dispute, rather than the judge, played the most important role in determining the outcome. *Id.* at 10.

but also have the strongest incentive to identify and press their best contentions. Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look At Sua Sponte Decisions by Appellate Courts*, 69 Tenn. L. Rev. 245, 247–248 (2002) ("The fundamental premise of the adversary process is that these advocates will uncover and present more useful information and arguments to the decision-maker than would be developed by a judicial officer acting on his own in an inquisitorial system.").

Making the parties rather than the courts responsible for identifying and pressing the issues is also critical to the legitimacy of the judicial process. Increasing party involvement and control contributes to the parties' willingness to accept the court's decision and to consider it fair, even if it is contrary to their interests. Landsman, *supra*, at 44–45. More fundamentally, requiring the parties to identify the arguments that favor their position preserves both the fact and appearance of *judicial neutrality*. One of the hallmarks of the adversarial system is that it removes judges from the fray. Relieved of the obligation to identify arguments or advocate for either party—each of which has its own advocate—the judge adopts a more detached role, deciding the matter solely "on the basis of facts and arguments pro and con adduced by the parties." *McNeil*, 501 U.S. at 181 n.2. The adversarial system thus avoids the risk of subtle bias that can result when the judge is required to press the matter forward himself. See Kirsten Debarba, *Maintaining the Adversarial System*, 55 Vand. L. Rev. 1521, 1528 (2002) (citing 1 Wayne R. LaFave, *Criminal Procedure* § 1.4(c) (2d ed. 1999)). Critically, it also preserves the *appearance* of impartiality that is essential to the legitimacy of the judicial branch. *Mistretta* v. *United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality."); *Liteky* v. *United States*, 510 U.S. 540, 557 (1994) (Kennedy, J., concurring) ("one of the very

objectives of law is the impartiality of its judges in fact and appearance").

Allowing judges to raise non-jurisdictional defenses *sua sponte* can undermine the adversary system and the important values it serves. When judges unnecessarily raise issues *sua sponte*, they risk invading the role of the advocate and drawing their own neutrality and impartiality into question. Particularly from the perspective of the losing party, the judge who reaches out *sua sponte* to raise a dispositive defense—a defense the party's own lawyers have not raised themselves or, as here, actually conceded—will often appear to have assumed the role of surrogate counsel for the other side. The appearance of partisanship is aggravated further still when the judge, by raising the issue and ruling on it after the time for its assertion has lapsed, effectively relieves the opposing side of the consequences of a waiver. It rarely will appear "fair" for a judge to assist one side but not the other in advocating its case. Such unfairness is particularly problematic in the habeas context because raising defenses *sua sponte* will almost invariably favor one side, the State. Thus, when courts raise affirmative defenses *sua sponte*, they place themselves in the "untenable position of ferreting out possible defenses" the parties have not addressed and come "dangerously close to acting as advocates for the state rather than as impartial magistrates." *Smith* v. *Horn*, 120 F.3d 400, 409 (3d Cir. 1997).

That is precisely the appearance that arose here. The trial court in the first instance unmistakably assisted the State in its defense by raising an issue—the timeliness of the habeas petition—the State had not only failed to raise, but had *conceded* in its answer. Pet. App. 6–7. Having raised the issue *sua sponte*, the trial court then aggravated the resulting appearance of partiality by excusing not only the State's waiver, but also the concession of timeliness contained in its answer. There is no small irony here that

petitioner's putatively untimely assertion of his claim is being held against him precisely because the State's failure to assert a defense at all—much less in a timely fashion—is being forgiven. It is regrettably commonplace today to hear litigants complain that the judge was biased in favor of the other side. The sort of *sua sponte* raising of issues and relief from waiver that occurred in this case unnecessarily fuel such perceptions.

That is not to say that there are *no* circumstances in which courts may raise issues *sua sponte* and relieve a party of the consequences of waiver. To the contrary, as explained below, courts may raise issues and overlook waivers where, for example, (a) Congress has by statute or implication directed them to do so, or (b) the issues transcend the narrow interests of the parties. Those exceptions are wholly inapplicable here.

II. NOTHING IN THIS CASE JUSTIFIES LOOSENING THE ORDINARY SYSTEM OF ADVERSARY PRESENTATION OR THE RULES OF WAIVER APPLICABLE TO LIMITATIONS DEFENSES

The doctrines of waiver and forfeiture, of course, are not immutable principles. They may, under certain circumstances, be displaced by statute or modified if the interests at stake transcend those of the parties before the court. In those circumstances, courts may undertake to address issues the parties themselves have not raised. But neither of those exceptions apply here.

A. The Federal Habeas Statute And Habeas Rules Do Not Support Departure From The Traditional Rule That Unasserted Limitations Defenses Are Waived

1. "It is well-settled that habeas corpus is a civil proceeding." *Browder* v. *Director, Dep't of Corrs.*, 434 U.S. 257, 269 (1978); see, *e.g.*, *Banks* v. *Dretke*, 540 U.S. 668, 704–705 (2004) (holding that Federal Rule of Civil Procedure

15(b) applies in habeas cases). Rule 11 of the Habeas Rules authorizes federal courts to apply the ordinary Federal Rules of Civil Procedure in habeas cases: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." Implementing the authority granted by Habeas Rule 11, Federal Rule of Civil Procedure 81(a)(2) declares that the Federal Rules "are applicable to proceedings * * * [of] habeas corpus * * * to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions." Fed. R. Civ. P. 81(a)(2).

There thus can be little doubt that the principles of waiver and forfeiture generally apply in habeas cases. This Court has, "'in the context of a broad array of constitutional and statutory provisions,' articulated a general rule that presumes the availability of waiver." *Hill*, 528 U.S. at 114. There is no reason to except habeas from that general rule, and no historical basis for doing so. To the contrary, this Court has unhesitatingly applied the doctrine of waiver in habeas proceedings. See, *e.g.*, *Gray* v. *Netherland*, 518 U.S. 152, 165–166 (1996) ("procedural default is an affirmative defense" the State must "raise * * * or lose the right to assert"); *Schiro* v. *Farley*, 510 U.S. 222, 228–229 (1994) (State "can waive" the prohibition on "retroactive application of new rules" by "not raising it"). And there is especially good reason to apply the doctrine here. As explained above, the Federal Rules of Civil Procedure, which incorporate the principle of waiver, are "applicable as a general matter to habeas cases." *Slack* v. *McDaniel*, 529 U.S. 473, 479 (2000).

Nothing in the text or history of 28 U.S.C. § 2254 counsels departure from that approach. To the extent

Congress intends to protect against the waiver of a right "that intention" often "will be deducible from [the] text or legislative history." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) ("If Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history"). Here, there is no evidence that Congress intended to defeat the ordinary rule of waiver for statute of limitations purposes.

The evidence, in fact, is to the contrary. Where Congress intended departure from the ordinary rules of waiver for habeas petitions, it said so expressly. For example, when addressing exhaustion of state remedies, Congress provided that "[a] state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, *expressly waives* the requirement." 28 U.S.C. § 2254(b)(1)(A) (emphasis added). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States* v. *Rusello*, 464 U.S. 16, 23 (1983). Congress clearly knew how to provide for departure from the traditional rules of waiver. That Congress textually provided for such a departure for the issue of exhaustion but not for the statute of limitations in Section 2254 speaks volumes about Congress's intent. See, *e.g.*, *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (the heightened pleading requirement for specific issues under Federal Rule of Civil Procedure 9 implies the exclusion of that requirement for other issues).

2. Nonetheless, several courts (including the decision below) have read Habeas Rule 4 to justify wholesale de-

parture from the ordinary rules that the parties are responsible for raising affirmative defenses, and that defenses not raised are deemed waived. Pet. App. 5a. But Habeas Rule 4 provides a highly circumscribed departure from those principles, for screening purposes only. That exception cannot be expanded beyond its text to the circumstances here.

Entitled "Preliminary Consideration by Judge," Habeas Rule 4 provided in relevant part:

> The original petition shall be * * * examined *promptly* by the judge to whom it is assigned. If it *plainly appears* from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal * * * . *Otherwise* the judge shall order respondent to file an answer * * * .

Habeas Rule 4 (emphasis added).[4]

As its text and title make clear, Rule 4 merely establishes a limited preliminary screening period that terminates when the State files an answer. "[P]romptly" after the petition is filed, the judge must conduct a preliminary review and dismiss the petition if it "plainly appears" to be without merit. But the word "otherwise" makes it clear that the process of *sua sponte* review ends once the judge requires an answer. Webster's dictionary defines "otherwise" as meaning "in different circumstances" or "under other conditions." *Webster's Third New International Unabridged Dictionary* (3d ed. 1971). Simply put, Rule 4 contemplates an initial gatekeeper screen by the district court through which it determines whether there is a plain defect that requires *sua sponte* dismissal. If the trial court

[4] Habeas Rule 4 has since been amended. The changes were "intended to be stylistic" and not "substantive" with the exception of changes to the notification provisions. Advisory Committee Notes to Habeas Rule 4.

fails to dismiss the petition—in other words, if the "otherwise" condition is met—the trial court orders an answer and the period for *sua sponte* screening comes to an end.

Rule 4's direction that a petition be presented and examined "promptly by the judge to whom it is assigned" likewise indicates an intent to limit the judge's power to summarily dismiss a petition to the period before an answer has been filed. It is a "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States* v. *Nordic Village*, 503 U.S. 30, 36 (1992). The use of "promptly" in Rule 4 emphasizes the premium placed on the expeditious dismissal of marginal petitions. That emphasis is at odds with a prolonged authority of *sua sponte* dismissal that lasts throughout the course of the habeas proceedings. It would be odd, indeed, for Congress to have required the district court to screen cases "promptly" in the initial stages of habeas litigation, and to order an answer absent dismissal, if Congress had intended district courts to examine the petition for defects *sua sponte* over the entire course of litigation.

Departures from the common law and prior practices, moreover, are to be strictly construed. *Shaw* v. *R.R. Co.*, 101 U.S. 557, 564 (1879) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."); *Norfolk Redevelopment & Hous. Auth.* v. *Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983) ("[It] is a well-established principle of statutory construction that '[t]he common law * * * ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose'"). The traditional rule in our adversary system is that the *parties* must raise their affirmative defenses, and that courts ought not invade the advocates' role by raising

such defenses (and relieving parties from the consequences of waiver) *sua sponte*. Rule 4 contains a single, narrow exception to this rule, permitting the district court to dismiss claims *sua sponte* during an initial screening period before the answer is filed if it "plainly appears from the face of the petition" that relief is not warranted. Particularly given the rule that departures from traditional practices are strictly construed, Rule 4's narrow exception during an initial screening period cannot be read as a wholesale license for judges to assume the advocate's role by raising new defenses *sua sponte after* an answer has been filed.

3. Perhaps recognizing the absence of a textual basis for post-answer *sua sponte* dismissals based on a waived limitations defense, at least one court has invoked the "purpose[s]" of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), such as "comity," "federalism," and protecting the "finality" of convictions. *United States* v. *Bendolph*, 409 F.3d 155, 162 (3d Cir. 2005) (en banc). But Congress does not enact purposes. It enacts statutes. When Congress amended the federal habeas statutes through the AEDPA, it drew a balance between the salutary purposes of "the Great Writ"—ensuring that individuals are not incarcerated in violation of their federal rights—and the potentially deleterious effects of collateral attacks on the interests of federalism, comity, and finality. That balance includes specific provisions modifying the rules of waiver applicable to, for example, failure to exhaust. But Congress did not modify the rules applicable to the statute of limitations. The balance under AEDPA, by virtue of the Habeas Rules, also includes a requirement that the district courts perform an initial screening function before answer, during which the courts may dismiss a petition *sua sponte* if it "plainly" lacks merit. But that departure from our ordinarily adversarial system of justice was carefully circumstanced to confine it to a "prompt" review prior to the answer. To assert that the AEDPA's "purposes"

justify further departures from the ordinary rules—departures found nowhere in statutory text—would rewrite the AEDPA and the Habeas Rules under the guise of construing them.

That effort, moreover, would effectively require the federal courts to read otherwise applicable Federal Rules of Civil Procedure differently for habeas cases and other civil cases. Rules 8 and 12 are unmistakable in their import: Statute of limitations defenses must be asserted by answer or be waived. To impose a *different* rule for habeas cases alone would be unfaithful to the spirit of the Rules and the interest in uniform application. See Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What did the Drafters Intend?*, 21 Suffolk U. L. Rev. 351, 356-357 (1987) ("The dominant intellectual and operational force" moving the Advisory Committee for the Federal Rules was the belief "that procedure should be entirely separate from substance"). There simply cannot be two different interpretations of Rules 8 and 12 with respect to statutes of limitations—one for most civil cases, under which statute-of-limitations defenses would be waived if not raised by answer, and another for habeas cases, under which the statute-of-limitations defense would be available for assertion by the State or the court *sua sponte* throughout the case, even after the State waives (or, as here, concedes) the issue. A single rule cannot mean two different things at once. *Clark* v. *Martinez*, 125 S. Ct. 716, 722–723 (2005).

Such an approach, moreover, would sow inappropriate confusion into the law—confusion that uniform rules of civil procedure are designed to prevent. There are myriad rights and causes of action that implicate a variety of values that might be invoked by a court to justify differential application of the federal rules. But courts are not and should not be in the business of re-examining procedural rules on a case by case basis in view of the rights or cause of

action being asserted. Uniform interpretation of the federal rules creates efficiency. It relieves claimants of the need to navigate arcane procedural requirements unique to the cause of action they assert. And it ensures predictability. Interpreting procedural requirements so they vary from case to case and cause of action to cause of action undermines those values. A better way to sow confusion, uncertainty, and litigation is hard to imagine.

B. The Defenses That Traditionally Can Be Raised *Sua Sponte* Are Fundamentally Different From The Statute-Of-Limitations Defense At Issue Here

While adversary presentation is the ordinary rule in litigation, there is a limited category of claims that courts can (and sometimes must) raise *sua sponte*—those that "implicate[] values that may transcend the concerns of the parties." *Brown* v. *Fauver*, 819 F.2d 395, 398 (3d Cir. 1987). Thus, a federal court may inquire into its own subject-matter jurisdiction at any time, and failure to raise the issue early in litigation does not result in its waiver. That is true because subject-matter jurisdiction is not solely or even predominantly a matter of concern to the parties. To the contrary, because subject-matter jurisdiction reflects "a restriction on federal power," it is a matter of great concern to the Congress and the courts. *Ins. Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Consequently, "no action of the parties"—neither waiver nor consent—"can confer subject-matter jurisdiction upon a federal court"; only Congress can confer jurisdiction. *Ibid.*

In *Granberry* v. *Greer*, 481 U.S. 129 (1987), this Court applied similar principles to conclude that, in habeas cases, district courts may dismiss claims *sua sponte* where the claimant has failed to exhaust state remedies. The requirement of exhaustion has since been expressly incorporated into the habeas statute as a prohibition on

federal court relief. Federal courts, Section 2254 now declares, "shall not" grant a writ of habeas "unless it appears that * * * the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). Like subject-matter jurisdiction, the requirement of exhaustion serves interests beyond those of the parties. It serves the interests of federal and state *courts* by minimizing potential conflicts between them, offering state courts the opportunity to address the claims before federal interference is threatened. *Rose* v. *Lundy*, 455 U.S. 509, 515 (1982). By requiring a habeas petitioner to exhaust his state court remedies, federal courts "defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Id.* at 518. The doctrine of exhaustion "protect[s] *the state courts'* role in the enforcement of federal law and prevent[s] disruption of state judicial proceedings." *Ibid.* (emphasis added). Finally, it protects federal judicial resources. Sometimes state courts will grant relief and, even when they do not, they often will develop a complete factual record. *Id.* at 519. Moreover, nothing in the exhaustion requirement forecloses the claimant from eventually receiving federal review of his claims.[5]

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[5] Some courts of appeals have suggested in *dicta* that *forum non conveniens* can be raised *sua sponte*. See, *e.g.*, *Bendolph*, 409 F.3d at 164 n.14; *Corporacion Mexicana de Servicios Maritimos* v. *M/T Respect*, 89 F.3d 650, 656 n.1 (9th Cir. 1996). To the extent those decisions are correct, they rest on the view that, in addition to protecting the interests of the parties, *forum non conveniens* serves the interests of witnesses and the courts, which need to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43–44 (1991); see also *Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 454 n.4 (1994) ("[*F*]*orum non conveniens* is not a substantive right of the

The statute of limitations at issue in this case stands on an entirely different footing. Ubiquitous in the law, statutes of limitations generally provide a right of repose that vests in the individual. Unlike subject-matter jurisdiction or exhaustion of state remedies, statutes of limitations are designed primarily to protect those before the court, not to serve the interests of non-parties, protect structural interests, or prevent conflict between two judicial systems with otherwise concurrent jurisdiction. Indeed, limitations periods operate like quintessentially private rights. Parties regularly enter into private tolling agreements that have the effect of altering limitations periods. Such private agreements between the litigants, however, would be wholly ineffective to create subject-matter jurisdiction.

Moreover, subject-matter jurisdiction and exhaustion of remedies are not specifically listed in Rule 8(c) as matters that must be raised in an answer. Although *res judicata* is an affirmative defense listed in Rule 8, this Court has stated that *res judicata* "might be appropriate" for *sua sponte*

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parties, but a procedural rule of the forum."). Although the parties benefit from a case being heard in the proper court, in that they receive a fairer and more efficient trial, it may be the judicial system that is the ultimate beneficiary, because the courts are able to provide what is expected of them. The factors considered by a court when deciding whether to dismiss on *forum non conveniens* grounds illustrate this point. Courts consider "the relative ease of access to sources of proof; the availability of compulsory process for attendance of * * * witnesses; * * * and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947). Public concerns are a factor when litigation is not brought at its origin, such as burdening courts with administrative duties and the community with jury duty. *Id.* at 508–509. At the same time, because of the implications of essentially rejecting a plaintiff's choice of forum, dismissal on *forum non conveniens* grounds "must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44.

assertion "in special circumstances." *Arizona* v. *California*, 530 U.S. 392, 412 (2000). That would be true, however, only to the extent that the policy underlying *res judicata* is "not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste." *Ibid.* (internal quotation marks omitted). Like the other defenses that may be raised *sua sponte*, *res judicata* may be raised by a court on its own initiative only insofar as it protects interests beyond the parties, including the judiciary's interest in avoiding waste.

The concern about "judicial waste" that might support *sua sponte* assertion of *res judicata*, however, does not apply in the habeas context. Waste is the relitigation of an issue where that issue *never was intended* to be litigated a second time. Federal habeas, by contrast, contemplates and necessarily involves the relitigation of issues already resolved in state court. Allowing that relitigation to occur later (after an unasserted limitations period expires) rather than earlier does not "waste" judicial resources. It merely allows the relitigation that Congress intended to permit at some point in time. In any event, even in the context of *res judicata*, "[w]here no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte*, thereby eroding the principle of party presentation so basic to our system of adjudication." *Id.* at 412–413. Because statutes of limitations predominantly protect parties, not judicial interests, courts should not merely be cautious "about raising [those bars] *sua sponte*." Instead, they should avoid raising limitations issues *sua sponte* altogether and thereby avoid "eroding the principle of party presentation so basic to our system of adjudication" and critical to the appearance of judicial neutrality.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

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On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the State waive the one-year limitations period of 28 U.S.C. § 2244(d) by failing to plead it in an answer or otherwise raise it in a federal district court?

Does a federal district court have the power under Rule 4 of the Federal Rules Governing Section 2254 Cases to dismiss a habeas petition *sua sponte* on grounds of untimeliness after it has ordered a response from the State and the State has conceded timeliness?

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that

[1] Both Petitioner and Respondent have consented in writing to the filing of this brief, and each party's letter of consent has been filed with the Court. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving federal habeas corpus. NACDL files approximately 35 *amicus curiae* briefs each year on various issues in this Court and other courts. NACDL has filed *amicus curiae* briefs in this Court in many cases involving federal habeas corpus, including cases raising issues similar to the one presented here. See, *e.g.*, *Pliler* v. *Ford*, 542 U.S. 255 (2004); *Slack* v. *McDaniel*, 529 U.S. 473 (2000); *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998).

Vast numbers of habeas corpus petitions filed in the federal courts are affected by the statute of limitations of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the rules governing pleading, waiver, and the *sua sponte* dismissal power of the federal district courts under the Federal Rules Governing Section 2254 Cases. The issues in this case thus directly implicate the interests of NACDL's members and their clients.

INTRODUCTION

In the decision below, the United States Court of Appeals for the Eleventh Circuit authorized a federal district court to dismiss *sua sponte* a petition for habeas corpus as untimely under the AEDPA statute of limitations – even after the State had filed an answer in which it did not plead the statute of limitations, and even though the State had conceded the timeliness of the petition. Pet. App. 6a. According to the Eleventh Circuit, Rule 4 of the Federal Rules Governing

Section 2254 Cases ("Habeas Rules") "'differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses,'" and justified the district court in *sua sponte* dismissing the habeas petition in this case. *Id.* at 5a. This ruling is flatly irreconcilable with the plain language, structure, and purpose of the Habeas Rules. There is simply no foundation for the remarkable ruling of the Eleventh Circuit that the Habeas Rules adopted by this Court dispense with the traditional adversarial process and enjoin federal district courts *sua sponte* to invoke affirmative defenses on behalf of the State that the State itself does not assert.

The decision below runs roughshod over the express limitations on the district court's powers in Habeas Rule 4. Rule 4 permits *sua sponte* dismissals only *prior* to the ordering of an answer by the district court; only if the prisoner is not "entitled" to relief, which forecloses district court determination of any waivable defense; and only if the lack of entitlement is "plainly" apparent from the "face" of the petition and annexed exhibits, which categorically forecloses determination of any affirmative defenses (like limitations defenses) that cannot be determined strictly from the petition or annexed court records. Because the time limits of the AEDPA, 28 U.S.C. § 2244(d)(1)(A), are not jurisdictional, any affirmative defense based on the statute must be asserted in the State's answer or else it is waived.

Beyond the prohibition on such *sua sponte* dismissals found in the plain language of Rule 4, it is simply impossible to determine from the face of a habeas petition that it is untimely. The date of the decision from which timeliness is calculated is subject to tolling and other factors found in the Habeas Rules, none of which are evident from the face of the petition. To dismiss a petition for untimeliness without a show-cause order is to ignore these factors and to deny the petitioner notice and the opportunity to be fairly heard.

Finally, allowing a court to raise *sua sponte* an affirmative defense that has been waived by the state has deeply troubling results. It frustrates congressional intent to create a limitations defense, which Congress necessarily understood to be waivable. Furthermore, to give courts the power to cure the state's waiver of an affirmative defense is to erode the adversarial process, uniquely compromising in the habeas context the status of the federal judge as neutral decisionmaker.

ARGUMENT

I. THE DECISION BELOW CONTRAVENES THE PLAIN LANGUAGE OF RULE 4.

A. Habeas Rule 4 Confers on a District Court the Authority to Dismiss a Petition *Sua Sponte* Only Before the State Files a Response.

Habeas Rule 4 confers upon the federal district court a limited power to dismiss facially invalid petitions only *prior* to the effective commencement of adversarial proceedings with the State. That authority expires when adversarial proceedings begin – indeed, with any required *service* of the petition upon the State.

The Habeas Rules must be understood as a unitary whole providing for an orderly sequence of events. Rule 1 defines the applicability of the Habeas Rules. Rule 2 defines the persons eligible to petition for relief and the requisite form and content of a petition. Rule 3 then provides that the original and two copies of the petition should be filed with the clerk of the district court, who, having ascertained that the petition meets the requirements of Rules 2 and 3, "shall file the petition and enter it on the docket." Habeas R. 3. The habeas petitioner is not obliged to serve the petition upon the respondent contemporaneously with filing, and "[t]he filing of the petition shall not require the respondent to answer the

petition or otherwise move with respect to it unless so ordered by the court." *Id.* Indeed, Rule 4 makes plain that service of the petition upon the respondent occurs only after preliminary consideration of the petition by a district judge. Rule 4 provides:

> **Rule 4. Preliminary Consideration by Judge**
>
> The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general ....

Habeas R. 4;[2] see also *id.* adv. comm. note (noting that rule of mandatory service of petition regardless of whether an answer is ordered departs from prior practice, where "the respondent often d[id] not receive a copy of the petition unless the court directs an answer under 28 U.S.C. § 2243").

Rule 4 thus authorizes the district courts to conduct a "preliminary" (*i.e.*, pre-service) screening of habeas petitions

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[2] The quoted language of the Rule is from the version in force at the time of the lower courts' decisions. The rule was amended effective December 1, 2004. According to the Advisory Committee notes, no substantive change was intended regarding the quoted portion of the rule.

and then to dismiss summarily any facially invalid petition prior to service. As the Advisory Committee stated, Rule 4 reflects the pre-existing duty under 28 U.S.C. § 2243 "to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer. *Allen* v. *Perini*, 424 F.2d 134, 141 (6th Cir. 1970)." Habeas R. 4 adv. comm. note.

Contrary to the Eleventh Circuit's tortured reading, the language of Rule 4 does not allow for an inquisitorial power of the district court that continues even after the filing of the State's answer, much less a power to *sua sponte* adjudicate affirmative defenses of the State that the State has not asserted (and has even disavowed). To the contrary, Rule 4 expressly declares that the power to order summary dismissals exists only *before* the district court orders an answer or other pleading.

> If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal.... *Otherwise* the judge shall order the respondent to file an answer ....

Habeas Rule 4 (emphasis added). "Otherwise" is used disjunctively here: a court may *either* make an order for dismissal *or* order an answer. Once an answer is ordered, no further capacity to dismiss the petition apart from the respondent's motion is contemplated, as the Advisory Committee Notes to Habeas Rule 4 confirm:

> If it plainly appears from the face of the petition and any exhibits attached thereto that the petitioner is not entitled to relief in the district court, the judge must enter an order summarily dismissing the petition and cause the petitioner to be notified. *If summary dismissal is not ordered, the judge must order the respondent to file an answer or to*

> *otherwise plead to the petition* within a time period to be fixed in the order.

Habeas R. 4 adv. comm. note. Thus, under Rule 4, the examination stage ends and the pleading stage begins once the judge determines that the face of the petition and any exhibits do not "plainly appear" to show that the petitioner is not entitled to relief, and that summary dismissal is therefore inappropriate.

The sequential structure of the Habeas Rules underscores the self-evident meaning of Rule 4. Once an answer is ordered and the petition is served pursuant to Rule 4, Rule 5 defines the content of the answer; Rule 6 and Rule 7 govern discovery and expansion of the record; and Rule 8 governs evidentiary hearings. Contrary to the Eleventh Circuit's holding, the summary dismissal power that is specific to the preliminary examination of the petition in Rule 4 simply does not authorize the magistrate judge's *sua sponte* show-cause proceeding and dismissal order more than a year after the State filed its answer, well after the pleading stage has begun.

According to the plain text of the Habeas Rules, the right to dismiss the petition *sua sponte* comes *before* the respondent is ordered to make an answer and not after. As the Sixth Circuit has stated:

> Significantly, Rule 4 does not give a court continuing power to dismiss *sua sponte* the case after the court orders respondent to file an answer. In short, Rule 4 gives a district court the ability to dismiss habeas petitions *sua sponte*, but that ability expires when the judge orders a respondent to file an answer or take other appropriate action.

Scott v. *Collins*, 286 F.3d 923, 930 (6th Cir. 2002).

Indeed, most circuits are arrayed against the Eleventh Circuit on this point. Other courts of appeals, even among

those that permit *sua sponte* dismissals based on affirmative defenses, have permitted such dismissals after the State has filed an answer that does not raise the defense. See, *e.g.*, *Kiser* v. *Johnson*, 163 F.3d 326, 328 (5th Cir. 1999); *Nardi* v. *Stewart*, 354 F.3d 1134, 1141 (9th Cir. 2004) ("We now conclude that the district court lacks the authority to *sua sponte* dismiss a habeas petition as time-barred after the state files an answer which fails to raise the statute of limitations defense."); *Herbst* v. *Cook*, 260 F.3d 1039, 1042 & n.3 (9th Cir. 2001) (district court has authority to raise the statute of limitations *sua sponte* before the state ever files a response); *Hill* v. *Braxton*, 277 F.3d 701, 707 (4th Cir. 2002) ("Our point is simply that when a federal habeas court, in its discretion, raises an affirmative defense before the state has even entered a responsive pleading, as the district court did here, it acts consistently with Rule 4."); *Acosta* v. *Artuz*, 221 F.3d 117, 123 (2d Cir. 2000) (the Habeas Rules "give the district court the power to review and dismiss habeas petitions prior to any responsive pleading by the state"). This Court should vindicate the plain language of Rule 4 and reverse the Eleventh Circuit's aberrant ruling.

B. District Courts Lack the Power to Apply Limitations Defenses Under Rule 4 Because Determinations That Relief Is Foreclosed Cannot Be Made From the Face of the Petition.

Even if the summary dismissal power of Rule 4 could be invoked after the filing of the State's answer, Rule 4 by its plain terms would still forbid invocation of that power to dismiss the petition *sua sponte* for untimeliness under AEDPA.

The Eleventh Circuit (like other courts that permit *sua sponte* dismissals on this ground) has simply disregarded the requirement of Rule 4 that dismissal may only be ordered "[i]f it plainly appears *from the face of the petition and any exhibits annexed to it* that the petitioner *is not entitled* to relief in the district court." Habeas R. 4 (emphasis added). It is

possible that the petition and exhibits on their face may indicate both the date of filing and "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," 28 U.S.C. § 2244(d)(1)(A), and thus allow the district court to determine whether more than one year had elapsed between those two dates. But even if these dates can be ascertained, a district court can *never* conclude from the "face" of the petition and attached exhibits that a petitioner "is not entitled to relief in the district court" because of the statute of limitations, for three independent reasons.

First, the limitations period of section 2244(d)(1)(A) only applies if the date when direct review of the conviction concluded or became unavailable is later than three other dates specified in subsections (d)(1)(B) to (D). The applicability of at least one of those subsections – subsection (d)(1)(B), which sets the commencement date of the limitations period as "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing," *id.* § 2244(d)(1)(B) – was not in this case, and never will be, ascertainable from the face of the petition. A district court would always have to issue an order to show cause why subsection (d)(1)(A) should not apply, because that is the only way to make sure that there was no unlawful impediment to earlier filing created by state action that would trigger the application of (d)(1)(B). However, Rule 4 does not authorize show-cause orders; instead, it only authorizes *sua sponte* dismissal based on the face of the petition. If a district court must issue a show-cause order to ascertain whether facts exist that might prevent dismissal of the action, then by definition it is not determining the petitioner's entitlement to relief solely from "from the face of the petition and any exhibits annexed to it." Accordingly, the district court (or a magistrate judge acting in its stead) will always exceed its authority under Rule 4

because show-cause orders are necessary before dismissal can be ordered. Rule 4 simply cannot be read to grant district courts a power of summary dismissal for statute of limitations violations.

Second, and relatedly, a district court can never determine from the face of the petition that a plaintiff is not entitled to relief by virtue of subsection (d)(1) because the limitation period therein is always *potentially* subject to tolling (a) under the equitable tolling doctrine, *Steed* v. *Head*, 219 F.3d 1298, 1300 (11th Cir. 2000); (b) by agreement of the petitioner and the state; or (c) by operation of the statutory tolling provision of subsection (d)(2). Once again, a district court cannot hold a petition time-barred without giving the parties by show-cause order an opportunity to be heard as to whether there are reasons the limitations period may not apply, such as tolling. It matters not that, in the show-cause proceeding here, the district court rejected petitioner's equitable tolling defense, and that the other two sources of tolling did not apply. See Pet. App. 7a, 13a-14a. The point is that the possibility of tolling can never be excluded simply from the face of the petition, and always necessitates a show-cause proceeding to give the parties an opportunity to be heard. Any such hearing (such as the one conducted by the magistrate judge here) is unauthorized by Rule 4. Rule 4 simply does not permit *sua sponte* determinations of statute of limitations questions.

This is why the Court stated in *Pliler* v. *Ford* that "[D]istrict judges often will not be able to make these calculations [of whether the AEDPA limitations period has run] based solely on the face of habeas petitions." 542 U.S. at 232. Moreover, for reasons similar to the foregoing, the Second Circuit in *Acosta* vacated a district court's judgment because "the courts dismissed without affording the petitioners notice and an opportunity to be heard." *Acosta*, 221 F.3d at 124. Continuing, it held that "[t]he long-standing general rule is that a court may not dismiss an action without

providing the adversely affected party with notice and an opportunity to be heard." *Id.* Simply put, to dismiss *sua sponte* a petition for untimeliness does not afford petitioner notice and an opportunity to be heard.

Third, even if the foregoing hurdles could be overcome, a district court can only conclude that the petitioner "is not entitled to relief" within the meaning of Rule 4 if application of the statute of limitations in section 2244(d)(1) is mandatory (*i.e.*, is not waiveable). As discussed in the following section, there is simply no basis in AEDPA or the federal rules for holding a statute of limitations defense nonwaiveable.

II. THE WAIVER RULES THAT APPLY TO AFFIRMATIVE DEFENSES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD APPLY TO THE AEDPA STATUTE OF LIMITATIONS.

As an initial matter, a filing period that is not waiveable is effectively jurisdictional. Congress knows how to create a mandatory jurisdictional filing period, such as the requirement that petitions for certiorari to this Court in civil cases shall be filed within 90 days of entry of judgment. See 28 U.S.C. § 2101(c). In the AEDPA, however, Congress chose to enact "[a] 1-year period of limitation" in section 2244(d)(1). When Congress uses a term of art, such as "period of limitation," it is presumed to intend that specific meaning. In the words of *NLRB* v. *Amax Coal Co.*:

> Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.

453 U.S. 322, 329 (1981). See also *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) ("[W]e assume that when

a statute uses [a term of art], Congress intended it to have its established meaning"); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art ... it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.").

Section 2244(d)(1) is a statute of limitations, and there is no dispute that this statute, like any other statute of limitations, grants an affirmative defense. See *Jackson* v. *Secretary for Dep't of Corrs.*, 292 F.3d 1347, 1349 (11th Cir. 2002) ("the statute of limitations is an affirmative defense"). See also Pet. App. 4a; *Nardi*, 354 F.3d at 1140 ("There is no dispute that AEDPA's statute of limitations is an affirmative defense."); *Hill*, 277 F.3d at 705 ("We conclude that the one-year limitation period contained in § 2244(d) is an affirmative defense that the state bears the burden of asserting."); *Davis* v. *Johnson*, 158 F.3d 806, 810 (5th Cir. 1998); *Acosta*, 221 F.3d at 122 ("The AEDPA statute of limitation is ... an affirmative defense ...."); *Wilson* v. *Beard*, 426 F.3d 653, 664 (3rd Cir. 2005) ("given that the [AEDPA] statute of limitations is an affirmative defense").

Because the Habeas Rules do not address affirmative defenses directly, AEDPA's limitations defense is governed by the Federal Rules of Civil Procedure. Habeas Rule 11 states: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." As the Fifth Ciruit has stated, "[w]hen [the Habeas Rules] are otherwise silent, Rule 11 compels us to follow the Federal Rules of Civil Procedure in disposing of habeas corpus petitions." *McDonnell* v. *Estelle*, 666 F.2d 246, 249 (5th Cir. 1982); see also *Kiser*, 163 F.3d at 328-29. There is overwhelming support across the federal courts, both before and after the implementation of the AEDPA, for applying the Federal Rules of Civil Procedure to matters of procedure not

directly addressed by the Habeas Rules. See *Banks* v. *Dretke*, 540 U.S. 668, 687 (2004) (applying Rule 15(b) amendments to habeas pleadings); *Whitaker* v. *Meachum*, 123 F.3d 714, 715-16 & n.2 (2d Cir. 1997) (per curiam) (applying FRCP motions for summary judgment to habeas context); *Bleitner* v. *Welborn*, 15 F.3d 652, 654 (7th Cir. 1994) (judge has FRCP rule 6(b)(2) discretion to extend motion-filing deadlines in habeas cases); *Walker* v. *True*, 399 F.3d 315, 319 & n.1 (4th Cir. 2005) (applying motion to dismiss in habeas context); *Allen* v. *Calderon*, No. 02-6917, 2005 WL 271222, at *2 (9th Cir. Feb. 3, 2005) (applying appointment of guardian ad litem under FRCP Rule 17(c) to habeas context); *Williams* v. *Clarke*, 82 F.3d 270, 272-73 (8th Cir. 1996) (applying Rule 41(a)(1) voluntary dismissal to habeas context despite concerns of prisoners using it as a stalling tactic); *Woodford* v. *Garceau*, 538 U.S. 202, 208 (2003) (Rule 3 is applicable in the habeas context because nothing in the Habeas Rules contradicts it); *Browder* v. *Department of Corrs.*, 434 U.S. 257, 269-70 (1978) (applying Rules 1, 52(b), and 59); *Stephens* v. *Kemp*, 469 U.S. 1043, 1057 (1984) (applying Rules 12(c) and 56 in the habeas context); *Wilson*, 426 F.3d at 662 (applying Rules 6(a) and 6(e) to the AEDPA limitations period); *Caldwell* v. *Dretke*, Nos. 03-40927 et al., 2005 WL 2766688, at *4 (5th Cir. Oct. 26, 2005) (applying the definition of "judgment" found in Rule 54 to the AEDPA limitations period); *Libby* v. *Magnusson*, 177 F.3d 43, 49 (1st Cir. 1999) (Rule 8(c) "functions much the same way in habeas corpus jurisprudence"); *Long* v. *Wilson*, 393 F.3d 390, 400-01 (3rd Cir. 2004) (applying Rules 8 and 15(a) to the habeas context under the AEDPA); *Metts* v. *Miller*, 995 F.Supp. 283, 291 & n.13 (E.D.N.Y. 1997) (applying Rule 8(c) to determine that limitations is an affirmative defense, waived if not raised by the state).

Under the Federal Rules of Civil Procedure, statutes of limitations are waiveable. Rules 8(c) and 12(b) require that parties raise affirmative defenses in their first responsive

pleadings. Fed. R. Civ. P. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively ... statute of limitations ... and any other matter constituting an affirmative defense."); *id.* 12(b) ("[e]very defense ... shall be asserted in the responsive pleading," except certain specified defenses (not including statute of limitations) that may be raised by motion).

Under the Federal Rules, the consequence of not pleading the statute of limitations is the waiver of that affirmative defense. A limitations defense "is generally waived unless it is raised in the defendant's responsive pleading." *Expertise, Inc.* v. *Aetna Fin. Co.*, 810 F.2d 968, 973 (10th Cir. 1987); see also 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278, at 477 (2d ed. 1990) ("Generally, a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case."); *EEOC* v. *White & Son Enters.*, 881 F.2d 1006, 1009 (11th Cir. 1989) ("'[t]he hornbook law is that affirmative defenses must be specifically pled'.... [t]he court did not abuse its discretion in ruling that appellant had waived its affirmative defenses" by not pleading them before pre-trial); *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("a statute of limitations is subject to waiver" if not timely raised).

The same rule has traditionally applied in the habeas context. Hence, in filing an answer under Habeas Rule 5, the State is obliged to plead the limitations defense or else it is waived. See *Day* v. *Liberty Nat'l Life Ins. Co.*, 122 F.3d 1012, 1015 (11th Cir. 1997) (per curiam) ("The statute of limitations is an affirmative defense which must be specifically pled. This court has held in a number of discrimination actions that failure to plead the bar of the statute of limitations constitutes a waiver of the defense.") (citation omitted); *Scott*, 286 F.3d at 928 ("[T]he statute of limitations in § 2244(d) is an affirmative defense that must be pleaded to avoid waiver."); *United States ex rel. Galvan* v.

Gilmore, 997 F. Supp. 1019, 1026 (N.D. Ill. 1998) ("since § 2244(d) does not affect this court's subject matter jurisdiction over habeas petitions, the state can waive the § 2244(d) timeliness issue by failing to raise it") (citations omitted); *Robinson* v. *Johnson*, 313 F.3d 128, 134-37 (3d Cir. 2002) (sur panel reh'g) (holding that a state can waive the statute of limitations under the AEDPA "if not pleaded in the answer ... [or] raised at the earliest practicable moment thereafter"), *cert. denied*, 540 U.S. 826 (2003); *Nardi*, 354 F.3d at 1141 ("We agree with the Third and Sixth Circuits that the state waives its statute of limitations defense by filing a responsive pleading that fails to affirmatively set forth the defense.").

Nothing in AEDPA alters the ordinary rule that a statute of limitations affirmative defense is deemed waived if not pleaded. Indeed, AEDPA strongly supports the contrary inference that the limitations defense of section 2244(d)(1) is waiveable. For a separate defense of failure to exhaust state remedies, Congress expressly provided that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). Had Congress wished to require the express waiver of the limitations defense, or otherwise limit ordinary application of waiver doctrine, it could easily have included a similar provision for limitations defenses in this or another section.

It did not do so. Moreover, Congress's prohibition in section 2254 of implied waiver of exhaustion requirements indicates that Congress accepted the general principle that other affirmative defenses could be impliedly waived. The ruling below permitting *sua sponte* dismissal of habeas petitions on statute of limitations grounds, even when the State has failed to raise the defense in its answer, effectively abrogates the waiver doctrine. That ruling has no warrant in the Habeas Rules or AEDPA.

Given that Federal Rule of Civil Procedure 8 applies by force of Federal Rule 81(a)(2) and Habeas Rule 11, it would be inappropriate to infer a new and contravening rule of law from congressional silence on a subject. This Court has "'frequently cautioned that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."'" *United States* v. *Wells*, 519 U.S. 482, 496 (1997) (alteration in original) (quoting *NLRB* v. *Plasterers' Local Union No. 79*, 404 U.S. 116, 129-30 (1971) (quoting *Girourard* v. *United States*, 328 U.S. 61, 69 (1946))). It is "a cardinal principle of statuory construction that repeals by implication are not favored." *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). This principle "carries special weight when [the Court is] urged to find that a specific statute has been repealed by a more general one." *Id.* at 169. This principle is directly contradicted by the district court's inference that the specific rule of law long established by the Federal Rules of Civil Procedure relating to the treatment of affimative defenses is overturned by the Habeas Rules, or by the AEDPA, which do not directly address the point.[3]

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[3] The permissive character of Habeas Rule 11, which provides that "the Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provision or these rules," does not justify the district court's action in this case. First, while Habeas Rule 11 gives the district court discretion to apply any Federal Rule of Civil Procedure in a habeas case, Federal Rule of Civil Procedure 81(a)(2) makes the Federal Rules of Civil Procedure *mandatorily* applicable to habeas cases in two conditions are met: (1) they do not conflict with the habeas statutes and the rules, and (2) habeas practice conformed to those rules prior to their adoption. Fed. R. Civ. P. 81(a)(2). Habeas practice prior to the adoption of the Federal Rules of Civil Procedure conformed to the Federal Rule of Civil Procedure 8's rules regarding pleading and waiver of affirmative defenses. *Browder*, 434 U.S. at 270; *Capone* v. *Aderhold*, 2 F. Supp. 280, 282 (N.D. Ga.) ("an affirmative defense ... must be pleaded or be deemed to be waived"), *aff'd*, 65 F.2d 130 (5th Cir. 1933); *Johnson* v. *United States*, 13 F. Cas. 867, 868 (C.C.D. Mich. 1842) (No. 7418) ("By failing to set up the defence, the defendant waived it."). *See also Jeffries*

III. THE ELEVENTH CIRCUIT'S RULING THAT DISTRICT COURTS SHALL *SUA SPONTE* APPLY AFFIRMATIVE DEFENSES NOT RAISED BY THE STATE IS CONTRARY TO THE ADVERSARIAL SYSTEM OF JUSTICE.

The Eleventh Circuit has developed a theory that a district court is charged not only with the conventional task of determinining the facial validity of the claims stated in the petition (which Rule 4 does require), but also with conceiving and applying affirmative defenses that the State has not asserted. Any such notion is inimical to the adversarial process. "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring); *Hardiman* v. *Reynolds*, 971 F.2d 500, 502 (10th Cir.1992); *Acosta*, 221 F.3d at 122.

That the State should suffer the adverse effects of failing to argue a necessary point is nothing new; no exception is made for the State, which under an adversarial system is compelled as the defendant to raise points of argument or to lose their benefit. See, *e.g.*, *Wisconsin Dep't of Corrs.* v. *Schacht*, 524 U.S. 381, 389 (1998) (state waives its sovereign immunity defense if it fails to raise it).

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v. *Lillard*, 27 F.2d 230 (6th Cir. 1928); *Powell* v. *United States*, 206 F. 400 (6th Cir. 1913).

Second, the discretion to depart from the Federal Rules is not unbounded, and may only be exercised "in promoting the ends of justice," Habeas Rule 11 adv. comm. note, where alternative modes of procedure are more "appropriate" in the habeas context, *Harris* v. *Nelson*, 394 U.S. 286, 294 (1969). A general rule relieving the warden of pleading affirmative defenses, including limitations defenses, would not be a more appropriate procedure in habeas cases.

Therefore, assigning the district court the function of conceiving and applying affirmative defenses that the State does not assert compromises the status of the federal judge as neutral decisionmaker. It would be particularly strange to thrust a federal judge into that unfamiliar role in the special context of habeas corpus litigation, which is intended to be solicitous of the interests of the habeas petitioner:

> There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.

Harris v. *Nelson*, 394 U.S. 286, 292 (1969).

Moreover, the fairness found in the adversarial court system is an essential part of proper proceedings in our legal system. "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland* v. *Washington*, 466 U.S. 668, 696 (1984); see also *Republican Party* v. *White*, 536 U.S. 765, 801 (2002) (Stevens, J., dissenting) ("it is the ability ... to reevaluate [legal theories] in the light of an adversarial presentation, and to apply the governing rule of law even when inconsistent with those views, that characterize judicial openmindedness."); M. Hale, *History and Analysis of the Common Law of England* 258 (1713) (the adversarial process "beats and bolts out the Truth much better").

AEDPA suffers not in the least if the district courts are denied these extraordinary powers; the ability to avoid unneeded evidentiary hearings in federal habeas cases is well preserved by the court's initial ability to dismiss a habeas

petition during the examination stage. As the Sixth Circuit maintained, "the interests [of comity, finality, and federalism] are well preserved in light of a district court's continued ability to dismiss *sua sponte* a habeas petition as an initial matter." *Scott*, 286 F.3d at 930 n.10.

This Court has elsewhere criticized *sua sponte* dismissals, including in the habeas context, based on the notion that the most efficient way to resolve disputes is through briefing and argument by both parties. See *Trest* v. *Cain*, 522 U.S. 87, 92 (1997). Indeed, *sua sponte* dismissals to cure waiver harm the adversarial process by undermining the accountability of the State for its own defenses. "A district court's ability to dismiss a habeas petition *sua sponte* as an initial matter ... does not amount to a power to cure *sua sponte* a party's waiver of an affirmative defense." *Scott*, 286 F.3d at 930; see also *Haskell* v. *Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988) ("Since [the statute of limitations] is a waivable defense, it ordinarily is error for a district court to raise the issue *sua sponte*. Otherwise, the waiver aspect of Rule 8(c) would have little meaning.") (citations omitted); *Esslinger* v. *Davis*, 44 F.3d 1515, 1527 (11th Cir. 1995) (reversing a *sua sponte* dismissal of a habeas petition after the state had waived an affirmative defense because "[t]he court's *sua sponte* invocation of the procedural default to bar relief, despite the State's waiver, served no important federal interest"). The adversarial system of justice demands that the State be the master of its defenses and and bear the consequences of its failure to plead all affirmative defenses.

Finally, while a State's failure to assert a limitations defense will often be inadvertent, there may also be situations in which a State consciously decides against asserting the defense. A State may decide, for instance, that its obligations of fairness and its interest in preserving the integrity of its criminal proceedings outweigh, in a particular case, its interst in finality. For example, if there is severe police or prose-

cutorial misconduct, a flagrant violation of constitutional rights, or a high probability that the petitioner is innocent, the State may in the interest of justice decline to assert an available limitations defense. Or the State for strategic reasons may decide that it would not wish to have a court rule on contested limitations issues in a particular case. The Eleventh Circuit's ruling, despite cloaking its holding in the mantle of federalism, strips the State of its prerogative to determine which defenses to assert, in favor of a wooden mandatory command that the district court "shall make an order for ... summary dismissal" whenever it determines that a statute of limitations defense may lie. Nothing in AEDPA, the Habeas Rules, or principles of federalism and comity compels this result.

Nor can respondent rely on principles of comity, finality, and federalism to explain not the permissibility of *sua sponte* dismissals under the language of the habeas rules, but the reasons why courts desire such permission. As *Scott* held, however, "the interests [of comity, finality, and federalism] are well preserved in light of a district court's continued ability to dismiss *sua sponte* a habeas petition as an initial matter." *Scott*, 286 F.3d at 930 n.10. The habeas rules provide an examination stage for this very reason: judicial economy and federalism are "well preserved" by an ability to dismiss a habeas petition before the pleading stage begins.

Accordingly, even if the plain text of Habeas Rule 4 were ambiguous (which it is not), there is no reason to authorize a district court to dismiss a habeas petition *sua sponte* for procedural reasons once the pleading stage had begun. Indeed, the policies inherent in the adversarial habeas system compel the opposite result, and should have prevented the court below from dismissing Day's petition.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

PATRICK A. DAY
Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals of the Eleventh Circuit

BRIEF OF TEXAS, 30 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Can a State waive a limitations defense to a habeas corpus petition by either failure to plead or by express, although mistaken, concession?

2. Does a federal district court have power to *sua sponte* dismiss a habeas petition on an affirmative defense not invoked by the State in its answer?

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INTERESTS OF THE AMICI

Amici States have a substantial interest in ensuring the finality of their convictions and reducing the burden on their resources from meritless and even frivolous habeas petitions. Although Amici States strive to invoke their affirmative defenses in a timely manner, mistakes can and do happen. On these occasions, Amici States believe that a federal district court should have the power and discretion to decide whether to dismiss a habeas petition on a ground not raised by the State. The outcome of this case will affect the course of habeas petitions throughout the country and will affect the efficacy of the one-year statute of limitations on filing federal habeas petitions.

SUMMARY OF THE ARGUMENT

The federal courts have inherent equitable powers, which include the power to dismiss cases *sua sponte*. Although federal courts generally do not dismiss cases based on waived affirmative defenses, this Court has approved a different approach in habeas cases. In *Granberry v. Greer*, 481 U.S. 129 (1987), this Court held that a federal court may dismiss a habeas petition *sua sponte* on grounds of non-exhaustion even where the State had failed to raise that affirmative defense in the district court. Although the Court has not yet addressed whether this holding extends to the statute-of-limitations defense, there is no reason to distinguish the two affirmative defenses. The important societal interests furthered by the non-exhaustion defense—comity and federalism—are also furthered by the limitations period set forth in 28 U.S.C. § 2244(d).

No rule or statute deprives federal courts of their equitable power to invoke the limitations period *sua sponte*. Petitioner relies on negative inferences he draws from several rules, but none of the inferences is well grounded. Federal Rule of Civil Procedure 12(h)(3), which embodies the well-established rule that a federal

court may dismiss an action for lack of subject matter jurisdiction, does not remotely suggest that the courts' authority to dismiss actions *sua sponte* on other grounds has been revoked. And Rule 4 of the Rules Governing Section 2254 Cases merely establishes a screening procedure under which district courts must immediately dismiss facially meritless petitions. It says nothing, and implies nothing, about courts' power after the State is ordered to respond to a petition. Finally, Petitioner points to rules supporting the proposition that affirmative defenses that are not timely raised are waived. Even if that is true with respect to the habeas limitations period, that would mean only that the State can no longer move the court to dismiss based on that defense. That would not answer the distinct question whether a court has the power to dismiss a habeas petition *sua sponte* based on a waived defense, a question not answered by the rules.

The unique nature of habeas cases supports *Granberry*'s conclusion that federal courts have the discretion to dismiss petitions *sua sponte* based on affirmative defenses not raised by the State. Most notably, habeas cases differ from most civil actions in that they involve interests beyond those of the parties. Like criminal proceedings, habeas actions concern society's interest in order and safety. Habeas actions also affect the interests of comity, federalism, and finality, and (due to their great number) the courts' interest in judicial administration. The varied and important societal interests at stake in habeas cases militate in favor of district courts retaining the authority to dismiss petitions *sua sponte*; the States' error in failing to raise a defense in a timely fashion should not automatically bar a disposition that would further those interests.

The ways by which habeas practice differs from ordinary civil litigation also support district courts having the *sua sponte* power to dismiss petitions. First, the parties rarely engage in discovery in

habeas cases and habeas courts rarely hold evidentiary hearings. Habeas cases are therefore typically decided on the papers. As a consequence, the purported costs of *sua sponte* dismissals based on waived defenses—the time and resources expended litigating a case that should have been dismissed earlier—are far less in habeas cases. Second, several rules and practices in habeas cases are designed to ameliorate the strain placed on States of handling thousands of petitions, many of which are long and incomprehensible. Allowing habeas courts to dismiss petitions *sua sponte* is consistent with the objective of those rules and practices.

Finally, Petitioner has not presented any evidence to suggest that lower courts have misused their long-recognized power to dismiss habeas actions *sua sponte* based on the defenses of non-exhaustion and procedural default. There is no reason to believe that the courts will not sensibly exercise their discretion, after taking into account the competing interests at stake, to dismiss actions *sua sponte* based on the statute of limitations.

ARGUMENT

There is no dispute that the statute of limitations set forth in 28 U.S.C. § 2244(b) is an affirmative defense and not a jurisdictional prerequisite to a habeas action. The dispute centers instead on two other issues. The first is whether the State's failure to assert the limitations defense in a timely manner amounts to a waiver. We will leave that issue to the parties, who are best positioned to address whether a waiver occurred in this case. This brief will focus on the second issue, which is whether a federal district court possesses the equitable power to dismiss a habeas petition *sua sponte* based on untimeliness after the State has filed its response. A careful review of district courts' equitable powers, the Federal Rules of Civil Procedure (hereafter "Civil Rules"), the Rules Governing Section 2254 Cases (hereafter "Habeas Rules"), and the

nature of habeas practice leads to only one conclusion: district courts have that power.

I. Federal District Courts Have the Equitable Power to Dismiss Habeas Actions Based on Affirmative Defenses Not Raised by the State.

This Court has long recognized that the power to act *sua sponte* is "inherent in every court of justice." *Arkadelphia Co. v. St. Louis Sw. Ry. Co.*, 249 U.S. 134, 146 (1919). This power exists, in large measure, because a "judge, at least in federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene *sua sponte* to that end, when necessary." *Brown v. Walter*, 62 F.2d 798, 799 (CA2 1933) (Hand, L., J.). The range of actions district courts may take *sua sponte* is broad. Examples include entering summary judgment in a civil action, *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986), dismissing a case under the doctrine of *forum non conveniens*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 502 (1947), dismissing a case for lack of prosecution, *Link v. Wabash R. Co.*, 370 U.S. 626, 630 (1962), and dismissing an appeal in a criminal case when the defendant is a fugitive, *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970).

These decisions make clear that it is perfectly appropriate for a judge to dismiss a case on his or her own motion when the balance of interests militates in favor of that result. To be sure, the general practice has been for federal courts not to dismiss ordinary civil cases based on affirmative defenses that had not been raised by a party. *Kontrick v. Ryan*, 540 U.S. 443, 459 (2004). But, consistent with the equitable—and therefore flexible—nature of federal courts' inherent powers, courts have exercised the power to dismiss civil actions *sua sponte* based on unraised affirmative

defenses in the habeas context. The leading case is *Granberry v. Greer*, 481 U.S. 129 (1987).

In *Granberry*, this Court addressed "[h]ow an appellate court ought to handle a nonexhausted habeas petition when the State has not raised this objection in the district court." *Id.* at 131. The Court unanimously held that "the court is not obligated to regard the State's omission as an absolute waiver of the claim." *Id.* at 133. Quoting *Ex parte Royall*, 117 U.S. 241, 251 (1886), the Court stated that "[t]he injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it." *Granberry*, 481 U.S. at 133. Accordingly, held the Court, lower courts should evaluate on a case-by-case basis "whether the interests of comity and federalism will be better served by addressing the merits forthwith" or addressing the exhaustion defense. *Id.* at 134. The issue is one of discretion: cases in which the affirmative defense is "not asserted in the district court may present a wide variety of circumstances which the courts . . . drawing on their familiarity with state criminal practice, are able to evaluate individually." *Id.* at 136.

The lower courts have unanimously read *Granberry* to allow federal courts—both district and appellate—to dismiss habeas petitions on procedural default grounds, even when the government failed to raise that affirmative defense.[1] There is no reason to treat

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[1] *See, e.g., Yeatts v. Angelone*, 166 F.3d 255, 261-62 (CA4 1999); *Lorraine v. Coyle*, 291 F.3d 416, 425-26 (CA6 2002); *King v. Kenna*, 266 F.3d 816, 822 (CA8 2001) (en banc); *Windham v. Merkle*, 163 F.3d 1092, 1100 (CA9 1998); *Magouirk v. Phillips*, 144 F.3d 348, 357-58 (CA5 1998); *Brewer v. Marshall*, 119 F.3d 993, 999 (CA1 1997); *Esslinger v. Davis*, 44 F.3d 1515, 1524-25 (CA11 1995); *Washington v. James*, 996 F.2d 1442, 1448 (CA2 1993); *Hardiman v. Reynolds*, 971 F.2d 500, 501-05 (CA10 1992); *Hull v. Freeman*,

the affirmative defense of the statute of limitations any differently from the defenses of non-exhaustion and procedural default. All three defenses serve important and interrelated federal interests.

The one-year limitations period imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter "AEDPA") "quite plainly serves the well-recognized interest in the finality of state court judgments." *Duncan v. Walker*, 533 U.S. 167, 179 (2001). It does so by "reduc[ing] the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Id.* And, contrary to Petitioner's suggestion (Br. 41), this interest in finality has significant comity and federalism implications. The judgment for which finality is sought is a *state* court judgment; and its finality is being stalled by a *federal* proceeding. Speeding up the federal proceeding reduces the friction between the federal and state systems and limits the disruption caused by the federal habeas process. *See Engle v. Isaac*, 456 U.S. 107, 128 (1982) (noting that the "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible").

The doctrines of procedural default and non-exhaustion are therefore bound together with the interest in finality, a fact recognized by this Court when it stated, "[w]e now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In enacting AEDPA—of which the new statute of limitations was a key component—Congress sought to address

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932 F.2d 159, 164 n.4 (CA3 1991), overruled on other grounds by *Caswell v. Ryan*, 953 F.2d 853 (CA3 1992); *Burgin v. Broglin*, 900 F.2d 990, 997-98 (CA7 1990).

these interrelated concerns. *See Williams v. Taylor*, 529 U.S. 420, 436 (2000) ("AEDPA's purpose [is] to further the principles of comity, finality, and federalism."). Petitioner's effort to disentangle the doctrines and suggest that the interest in finality is of a different and less important nature is misguided. The interests that justify the *Granberry* rule fully justify its application to the statute of limitations defense.

II. Neither the Federal Rules of Civil Procedure Nor the Habeas Rules Circumscribe Federal Courts' *Sua Sponte* Powers.

If a Civil or Habeas Rule expressly stated that federal courts lack the power to dismiss habeas actions based on an affirmative defense the State failed to raise, that would be the end of the matter absent a contrary statutory directive. But neither set of rules contains such a provision. Courts' equitable authority to dismiss habeas actions *sua sponte* therefore remains in full force.

Petitioner, notwithstanding his lengthy detour into the Civil and Habeas Rules, does not argue that any rule *expressly* precludes a habeas court from dismissing an action *sua sponte* based on an affirmative defense that the government failed to raise. He relies instead on a series of negative implications that purportedly can be drawn from the rules and on the equation of habeas actions with ordinary civil actions. Pet. Br. 9–15. This argument fails for a number of reasons.

1. As initial matter, all of Petitioner's rule-based arguments founder in light of *Granberry*. None of the Civil and Habeas Rules upon which Petitioner relies was amended in any relevant way between *Granberry* and the date this case left the district court. Yet, as noted, *Granberry* held that a federal court of appeals may

dismiss a habeas action based on an unraised affirmative defense—namely, exhaustion. Petitioner's reading of the Civil and Habeas Rules can be reconciled with *Granberry* only if one distinguishes the *sua sponte* power of courts of appeals from the *sua sponte* power of district courts. None of the lower courts has made that distinction, however, *see infra* at 5-6 n.1, and for good reason.

Whatever policy reasons might have militated against allowing *sua sponte* dismissals in habeas cases apply equally or more so to *sua sponte* dismissals by federal courts of appeal. After all, such dismissals by their nature come far later in the process than dismissals by district courts, thereby increasing the resources expended before dismissal. Nonetheless, in *Granberry*, the Court unanimously rejected the "extreme position[]" that a court of appeals cannot reject a habeas petition based on an affirmative defense not raised by the State. 481 U.S. at 133. It would be absurd for the courts of appeals to have the power to reject *sua sponte* a habeas petition based on a defendant's failure to exhaust—or based on his procedural default or his failure to comply with the statute of limitations—but for the district courts not to have the power.

2. The principal Civil Rule upon which Petitioner relies is Rule 12(h)(3), which provides that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." According to Petitioner, the words "or otherwise," which allow a court to dismiss for lack of subject matter jurisdiction even when the parties have not "suggest[ed]" that course, creates the negative implication that district courts lack authority to dismiss *sua sponte* for other reasons. Pet. Br. 13. This reads far too much into the provision. Civil Rule 12(h)(3) simply embodies the non-controversial, well-established rule that subject matter

jurisdiction cannot be waived by the parties. *See, e.g., Jackson v. Ashton*, 33 U.S. 148, 149 (1834). It does not purport to speak to district courts' *sua sponte* power generally and does not purport to withdraw inherent, equitable powers possessed by the courts with respect to other matters.

Moreover, Petitioner's argument proves too much. If Petitioner were correct, this would mean that district courts lack the authority to rule *sua sponte* with respect to *any* matter covered by the Civil Rules apart from subject matter jurisdiction. After all, "[t]he drafters of the Civil Rules thus knew how to authorize *sua sponte*" powers and "chose not to do so with respect to those" other matters. Pet. Br. 13. Yet notwithstanding Rule 12(h)(3), this Court has continued to find that courts have the equitable power to dismiss actions on their own motion. For example, in *Celotex Corp.*, 477 U.S. at 326, the Court observed that "district courts are widely acknowledged to have the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all her evidence." This is so even though Civil Rule 56 authorizes parties to file motions for summary judgment, but does not speak to a court's power to grant summary judgment *sua sponte*.

3. Petitioner also points to Civil Rules 8(c) and 12(b) for the proposition that an affirmative defense that is not raised in the appropriate pleading is waived. Pet. Br. 10-11. That may well be true, but it does not answer the core question before this Court. A waiver is *not* the equivalent of a lack of *sua sponte* power. That a State may have waived an affirmative defense does not answer the question whether a court may *sua sponte* dismiss based on that defense; it raises the question.

A party who waives a claim or defense forfeits the right to raise the claim or defense at a later time and require the court to rule on it. *Eberhart v. United States*, 126 S. Ct. 403, 404-05 (2005) (citing *Kontrick*, 540 U.S. at 458-60). That is a significant consequence and a significant incentive not to waive claims. Forbidding judges from ruling on issues *sua sponte* is a very different consequence and one that does not necessarily follow from waiver. Even if Civil Rules 8(c) and 12(b) fully applied to defenses in habeas actions, they would not determine judges' power to act *sua sponte* on waived claims in habeas actions. No Civil Rule speaks to that particular consequence.

4. Petitioner asserts that Habeas Rules 4 and 5 support his position, but neither does. Habeas Rule 4 mandates that courts summarily dismiss facially meritless habeas petitions upon preliminary examination.[2] The Advisory Committee Note to the Rule sets forth its purpose: "it is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." If the court concludes that it cannot dispose of the case based on the

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[2] Current Habeas Rule 4 provides, in relevant part: "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed period of time, or to take other action the judge may order." Former Rule 4, before December 1, 2004, stated in relevant part, "The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise, the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate." Because former Rule 4 was in place when this case was before the district court, all references to Rule 4 will be to its former version unless otherwise indicated.

face of the petition and its exhibits, "the judge shall order the respondent to file an answer or other pleading . . . or to take such other action as the judge deems appropriate." In other words, once the petition has cleared the initial screening, the case will proceed ahead and the battle will be joined.

Petitioner asks this Court to draw the following negative inference from Habeas Rule 4: because the rule authorizes judges to dismiss petitions on their own motion *prior to* requiring an answer, but does not speak to the power of judges to dismiss petitions on their own motion *after* requiring an answer, this means judges lack the power to do so. Pet. Br. 28-30. Rule 4 cannot bear that weight. The existence of a screening procedure to weed out facially meritless petitions hardly suggests—let alone compels—that the rule be read to preclude judges from exercising their preexisting right to dismiss habeas actions *sua sponte*. A rule titled "Preliminary Consideration by Judge" does not dictate a judge's postliminary consideration. While Rule 4 does not expressly authorize post-answer *sua sponte* dismissals, neither does it expressly—or impliedly—prohibit them.[3]

Nor does Habeas Rule 5 detract from courts' inherent power to dismiss habeas actions based on affirmative defenses not raised by the State. Rule 5 has long stated that the State's answer "shall

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[3] One of Petitioner's amici has argued that a district court lacks the power to dismiss a petition under the Rule 4 screening procedure based on untimeliness. NACDL Br. 8-12. It is not clear how that argument bears on the questions presented. It suffices for now to observe that numerous courts of appeals have affirmed Rule 4 dismissals based on just that ground. *See Hill v. Braxton*, 277 F.3d 701, 705-06 (CA4 2002); *Jackson v. Sec'y for the Dep't of Corr.*, 292 F.3d 1347, 1349 (CA11 2002) (*per curiam*); *Herbst v. Cook*, 260 F.3d 1039, 1041 (CA9 2001); *Acosta v. Artuz*, 221 F.3d 117, 124 (CA2 2000); *Kiser v. Johnson*, 163 F.3d 326, 329 (CA5 1999).

state whether the petitioner has exhausted his state court remedies." In light of *Granberry*, it is impossible to read such a command to the State as somehow eliminating the courts' authority to dismiss *sua sponte* based on non-exhaustion. It is likewise impossible to read new Rule 5(b), which states that the answer "must state whether any claim in the petition is barred by . . . a statute of limitations" as having that effect. Once again, the cited rule might bear on the issue of waiver (the first Question Presented by Petitioner); it does not resolve the issue of courts' *sua sponte* power (the second Question Presented).

* * * * *

This Court does "not lightly assume that Congress has intended to depart from established principles such as the scope of a court's inherent power." *Carlisle v. United States*, 517 U.S. 416, 426 (1996) (internal citations and quotation marks omitted). Nothing in the Civil or Habeas Rules indicates any such intent with respect to the inherent power at issue in this case.

III. The Special Characteristics of Habeas Corpus Cases Justify this Court's Decision to Give Habeas Courts Broad Discretion to Invoke Their *Sua Sponte* Powers.

Petitioner asks the Court to treat habeas cases like any other civil case. Pet. Br. 15-19. But as this Court noted in *Harris v. Nelson*, 394 U.S. 286, 293-94 (1968), habeas is different. "It is, of course, true that habeas corpus proceedings are characterized as 'civil.' . . . But the label is gross and inexact. . . . Essentially, the proceeding is unique." *Id.* This uniqueness explains why the *Granberry* Court approved the practice of federal courts rejecting a habeas petition based on an affirmative defense not raised by the

State—even though that appears contrary to the practice in ordinary civil litigation.

Habeas cases involve broad societal interests. First and foremost, habeas cases are different because they involve interests beyond those of the immediate parties. *See United States v. Bendolph,* 409 F.3d. 155, 161-62 (CA3 2005) (en banc). While a habeas corpus proceeding is technically a civil suit seeking a release from custody, it is in essence another layer of appeal of a criminal conviction. Thus, the core interests at stake are the same as in any criminal proceeding—chiefly, society's need to maintain and establish order. These interests do not exist, at least not to the extent present in the criminal context, in any other civil context.

Relatedly, the Court has stated repeatedly in recent years that AEDPA's purpose is to further the interests of comity, finality, and federalism. *See Mayle v. Felix*, 125 S. Ct. 2562, 2573-74 (2005); *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *Duncan*, 533 U.S. Ct. at 178; *Williams*, 529 U.S. Ct. at 436 (2000). AEDPA builds upon the Court's longstanding recognition that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempt to honor constitutional rights." *Engle*, 456 U.S. at 128. Further, "[c]ollateral review of a conviction extends the ordeal of trial for both society and the accused." *Id.* at 127. These sorts of concerns are rarely present in other civil actions.

For these reasons, the courts of appeals have long held (even before AEDPA) that "[t]he failure to respond to claims raised in a petition for habeas corpus does not entitle the petitioner to a default

judgment."[4] The proper disposition of a habeas case is too important to be forfeited by the State's failure to respond to a petition. Few other types of civil litigation cannot be disposed of through default judgment.

Connected with the broad societal interest in habeas cases, the State does not possess a "win at all costs" interest emblematic of most adversarial parties in civil litigation. In criminal cases, the State's ultimate interests are the ends of justice. The State certainly has an interest in protecting its convictions and its laws and processes, but it does not have an interest in the continued incarceration of the innocent or in protecting unlawful practices. States can and do concede error when mistakes have been made. *See, e.g., Saldano v. Texas*, 530 U.S. 1212 (2000) (granting certiorari, vacating judgment below, and "remand[ing] for further consideration in light of the confession of error by the Solicitor General of Texas").

Finally, the federal courts have special interests at play in habeas cases, particularly given the massive numbers of habeas cases filed each year. According to the Administrative Office of the United States Courts, about 24,000 to 25,000 habeas cases have been filed each year between 2000 and 2004.[5] Habeas cases

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[4] *Gordon v. Duran*, 895 F.2d 610, 612 (CA9 1990) (citing *Bermudez v. Reid*, 733 F.2d 18, 21 (CA2 1984); *Broussard v. Lippman*, 643 F.2d 1131, 1134 (CA5 1981); *Goodman v. Keohane*, 663 F.2d 1044, 1047 n.4 (CA11 1981); *Allen v. Perini*, 424 F.2d 134, 138 (CA6 1970)); *see also* 28 U.S.C. § 2254(d) (identifying the showing that petitioner must make under AEDPA before a court is authorized to grant relief).

[5] *See* The Administrative Office of the United States Court, *Judicial Business of the United States Courts 2004*, at Table C-2, U.S. District Courts–Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During 12-month Period Ending Sept. 30, 2004, available at

constitute the largest single identifiable source of new civil cases by far. Giving federal courts greater discretion to dismiss time-barred cases frees up precious judicial resources to deal with the many other cases—habeas or otherwise—on their docket. Thus, for example, a court may decide that, rather than writing a fifty-page opinion rejecting a petitioner's myriad claims on the merits, it is more efficient to dismiss the petition through a three-page opinion addressing the limitations period. This gives the court time to address more fully other cases that truly warrant an extended merits review. *See Granberry,* 481 U.S. at 135 (noting that when a State inadvertently fails to raise an affirmative defense, courts have a duty to see whether interests in judicial efficiency are better served by dismissal).

Taken together, the broader societal interests present in habeas cases strongly militate in favor of giving courts increased discretion to dismiss habeas petitions. An error by the State in failing to raise an affirmative defense in its responsive pleading is not without consequence; but the many other societal interests at stake should not be forfeited on account of the State's error. District courts should be given the discretion to take into account the interests in comity, federalism, and finality—and, where appropriate, dismiss a habeas action based on an affirmative defense not raised by the State.

Habeas procedure differs from ordinary civil procedure. The practice of habeas cases is also notably distinct from ordinary civil practice. This is a function of both the hybrid nature of the proceedings and their overwhelming number. A habeas case begins when a prisoner in state custody sues the warden claiming he is

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http://www.uscourts.gov/judbus2004/contents.html (last visited December 29, 2005).

being held unlawfully. The remedy is not money, as in most civil cases, but freedom from custody. Not only is the form of relief unique, but in determining the lawfulness of a prisoner's custody the federal courts review state court criminal judgments to determine whether the State infringed upon a defendant's federal constitutional rights. As noted earlier, this review of a state court's judgments is more akin to an appeal than an original action. Indeed, habeas corpus cases are an exception to the general rule that lower federal courts are not empowered to review state court decisions. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517, 1526 (2005) (describing *Rooker-Feldman* doctrine as depriving district courts of jurisdiction over cases where the "losing party in state court file[s] suit in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment").

Cognizant of the inherent differences between habeas litigation and other civil litigation, the framers of the Habeas Rules made clear that the Civil Rules do not automatically apply in habeas cases. Habeas Rule 11 provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." As such, the federal courts may apply the Civil Rules where appropriate and beneficial, but they are not bound by them. *See Gonzales v. Crosby*, 125 S. Ct. 2641, 2646 (2005) ("Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only 'to the extent that [it is] not inconsistent with' applicable federal statutory provisions and rules."); *Woodford*, 538 U.S. Ct. at 208 (same). This Court has never read Civil Rule 81(a)(2)—which itself provides that the Civil Rules do not always apply in habeas cases—as undoing Habeas Rule 11's limitation on the Civil Rules' applicability.

Habeas Rule 11, in conjunction with the other Habeas Rules, has resulted in there being numerous unique (or at least unusual) aspects to habeas practice. Many of these differences strongly militate in favor of courts having the authority to dismiss petitions *sua sponte* based on defenses not timely raised by the State.

1. Several aspects of habeas practice lessen the costs of allowing *sua sponte* dismissals. Petitioner expresses the concern that *sua sponte* dismissals will result in wasted resources. Pet. Br. 37-38. But two aspects of habeas practice significantly reduce the likelihood that great amounts of time and effort will have been expended prior to a *sua sponte* dismissal. First, absent from most habeas cases is the common civil practice of discovery. Habeas Rule 6 allows discovery only by leave of court. This stems from the recognition that in most cases a complete record was developed during the prior state court proceedings. Mandatory discovery would wrongly allow federal habeas courts to transplant state courts as the primary forum for litigating state criminal cases.

Second, few habeas courts hold hearings at which new evidence may be introduced. AEDPA set tight strictures on when federal evidentiary hearings can be granted. *See* 28 U.S.C. § 2254(e)(2); *Bradshaw v. Richey*, 126 S. Ct. 602, 605 (2005) (criticizing court of appeals for failing to determine whether the petitioner satisfied the multiple threshold requirements before a federal evidentiary hearing may be held).[6]

The result is that habeas cases are essentially appellate in nature, involving review of a (usually complete) state court record.

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[6] Oral arguments are also a rare practice in the world of habeas cases. No rule or statute addresses this practice, and so most courts hold them only when they are beneficial to the court such as with a new issue of law.

The vast majority of habeas cases are disposed of on the pleadings and briefs. As a consequence, whereas an ordinary civil defendant's failure to assert an affirmative defense will typically lead to protracted discovery and possibly a jury trial, a State's failure to do so in a habeas case rarely results in the former and never in the latter. The purported costs of *sua sponte* dismissals based on waived defenses—the time and resources devoted by the parties and the court in litigating a claim that should have been dismissed earlier—are, therefore, far less in habeas cases.

Here, for example, although Petitioner emphasizes the time that elapsed between the State's answer and the court's invoking the statute of limitations (Br. 37-38), he has never shown that anything happened in that time period that prejudiced him in any way. In most habeas cases, after the pleadings are submitted the parties simply await the ruling of the federal court and expend no additional resources. *See, e.g., Long v. Wilson*, 393 F.3d 390, 399 (CA3 2004) (noting delay of 14 months not attributable to State and that it was reasonable for parties to await action of judge after pleadings filed).

2. Habeas practice imposes a unique burden on States. The enormous volume of habeas cases places a severe strain on State resources. Exacerbating the strain is the fact that habeas petitioners are overwhelmingly *pro se*. *Pro se* petitions are often handwritten and difficult to read, if not also long and substantively incomprehensible. In fact, it may sometimes be the case that when a State mistakenly fails to raise an available defense, that failure results from the difficulty in discerning the actual factual, procedural, and legal assertions the *pro se* petitioner is making. Habeas corpus rules and practice attempt to ameliorate the situation in a variety of ways.

First, as discussed earlier, Habeas Rule 4 requires habeas courts to review petitions and summarily dismiss them if they "plainly" do not merit relief. The rule's purpose, as also discussed earlier, is to "eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Advisory Committee Note to Habeas Rule 4.

Second, many courts that order responses allow the State to proceed with piecemeal litigation, *e.g.*, raise jurisdictional and affirmative defenses in initial responses and answer on the merits only if the litigation continues. This practice of piecemeal litigation illustrates the difference between habeas cases and other civil actions, for Civil Rules 8(c) and 12(b) provide that a party must normally raise all defenses in the first pleading. But many habeas courts understand the burden that strict application of Rules 8(c) and 12(b) would place upon a State, especially when the overwhelming majority of suits are meritless.

Third, whereas Civil Rule 12(a) requires an answer to be served within 20 days after service of the summons and complaint, habeas courts are often more flexible in setting a date by which the State must answer. In Texas alone, these answer deadlines vary from as little as 20 days to as long as six months. Again, this added flexibility is designed to ease the States' burden in responding to the multitude of habeas petitions.

Allowing habeas courts to dismiss petitions *sua sponte* based on affirmative defenses not raised by the State is consistent with these rules' and practices' recognition of the practical challenges States face in habeas actions. The holding in *Granberry* can be fairly understood as an acknowledgment of this situation and of the unique nature of habeas practice in general.

IV. The Federal Courts Can Apply, and Have Applied, Their *Sua Sponte* Power With Appropriate Discretion.

Petitioner claims that if the Court allows lower federal courts broad *sua sponte* power, those courts will be overcome with temptation and abuse it. Pet. Br. 39. Petitioner has presented no evidence, however, that district courts have abused their widely-recognized *sua sponte* power to dismiss cases based on the affirmative defenses of non-exhaustion and procedural default. And even if a court were overly aggressive in invoking unraised affirmative defenses, habeas petitioners would not be without a remedy. Federal district courts are always under the supervision of their circuit courts, which in turn are subject to correction in this Court. *Cf. Rhines v. Weber*, 125 S. Ct. 1528, 1535 (2005) (recognizing that "stay and abeyance should be available only in limited circumstances," but still giving district courts the discretion to employ the procedure). As this Court stated in *Link*, 370 U.S. at 633, concerns arising from *sua sponte* dismissals are best addressed not by curtailing inherent powers, but rather by determining whether a court has acted "within the permissible range of the court's discretion." Such factors as prejudice to the petitioner, the State's good faith, the time elapsed, and even the merits of the petition are appropriate considerations in judging the court's exercise of discretion.

With respect to the State's good faith, a brief response to Petitioner's "sandbagging" argument (Br. 14, 38) is in order. Affirmative defenses quite naturally benefit the State. These defenses not only protect the larger interests in comity and finality but also reduce the demands on State resources. Once a State has undertaken the effort necessary to answer the merits of a petition, the greatest amount of resources will usually have been expended. Very little, if any, benefit could possibly inure to the State in expending such resources and then belatedly asserting (or hoping

the court will *sua sponte* rule on) a defense. It is the rarest of cases in which a State would have any motivation to overlook and likely forfeit a "sure win" only to litigate the case on the merits. And there is no reason to believe district courts would be unable to discern when that occurs.

In the end, there is no reason to doubt that the district courts will, in the main, wisely exercise their discretion to dismiss habeas petitions *sua sponte*. In doing so, they will advance society's interests in finality, society's concomitant comity and federalism interests, and the courts' own case management interests.

CONCLUSION

This Court should affirm the lower court's judgment.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DAY *v.* McDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04–1324. Argued February 27, 2006—Decided April 25, 2006

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) sets a one-year limitation period for filing a state prisoner's federal habeas corpus petition, running from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," 28 U. S. C. §2244(d)(1)(A), but stops the one-year clock while the petitioner's "properly filed" application for state postconviction relief "is pending," §2244(d)(2). Under Eleventh Circuit precedent, which is not challenged here, that tolling period does not include the 90 days in which a petitioner might have sought certiorari review in this Court challenging state-court denial of postconviction relief.

Petitioner Day's Florida trial-court sentence was affirmed on December 21, 1999, and his time to seek this Court's review of the final state-court decision expired on March 20, 2000. Day unsuccessfully sought state postconviction relief 353 days later. The trial court's judgment was affirmed on appeal, effective December 3, 2002. Day petitioned for federal habeas relief 36 days later, on January 8, 2003. Florida's answer asserted that the petition was "timely" because it was filed after 352 days of untolled time. Inspecting the answer and attachments, however, a Federal Magistrate Judge determined that the State had miscalculated the tolling time: Under the controlling Eleventh Circuit precedent, the untolled time was actually 388 days, rendering the petition untimely. After affording Day an opportunity to show cause why the petition should not be dismissed for failure to meet AEDPA's one-year deadline, the Magistrate Judge found petitioner's responses inadequate and recommended dismissal. The District Court adopted the recommendation, and the Eleventh Circuit af-

Syllabus

firmed, concluding that a State's patently erroneous concession of timeliness does not compromise a district court's authority *sua sponte* to dismiss a habeas petition as untimely.

Held: In the circumstances here presented, the District Court had discretion to correct the State's erroneous computation and, accordingly, to dismiss the habeas petition as untimely under AEDPA's one-year limitation. Pp. 2–11.

(a) A statute of limitations defense is not jurisdictional, therefore courts are under no obligation to raise the matter *sua sponte*. Cf. *Kontrick* v. *Ryan*, 540 U. S. 443, 458. As a general matter, a defendant forfeits a statute of limitations defense not asserted in its answer or in an amendment thereto. See Federal Rules of Civil Procedure 8(c), 12(b), and 15(a) (made applicable to federal habeas proceedings by Rule 11 of the Rules governing such proceedings). And the Court would count it an abuse of discretion to override a State's deliberate waiver of the limitations defense. But, in appropriate circumstances, a district court may raise a time bar on its own initiative. The District Court in this case confronted no intelligent waiver on the State's part, only an evident miscalculation of time. In this situation the Court declines to adopt either an inflexible rule requiring dismissal whenever AEDPA's one-year clock has run, or, at the opposite extreme, a rule treating the State's failure initially to plead the one-year bar as an absolute waiver. Rather, the Court holds that a district court has discretion to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition. This resolution aligns the statute of limitations with other affirmative defenses to habeas petitions, notably exhaustion of state remedies, procedural default, and nonretroactivity. In *Granberry* v. *Greer*, 481 U. S. 129, 133, this Court held that federal appellate courts have discretion to consider a state prisoner's failure to exhaust available state remedies before invoking federal habeas jurisdiction despite the State's failure to interpose the exhaustion defense at the district-court level. Similarly, in *Caspari* v. *Bohlen*, 510 U. S. 383, 389, the Court held that "a federal court may, but need not, decline to apply [the nonretroactivity rule announced in *Teague* v. *Lane*, 489 U. S. 288, 310,] if the State does not argue it." It would make scant sense to distinguish AEDPA's time bar from these other threshold constraints on federal habeas petitioners. While a district court is not required to double-check the State's math, cf. *Pliler* v. *Ford*, 542 U. S. 225, 231, no Rule, statute, or constitutional provision commands a judge who detects a clear computation error to suppress that knowledge. Cf. Fed. Rule Civ. Proc. 60(a). The Court notes particularly that the Magistrate Judge, instead of acting *sua sponte*, might have informed the State of its obvious computation error and

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entertained an amendment to the State's answer. See, *e.g.*, Fed. Rule Civ. Proc. 15(a). There is no dispositive difference between that route, and the one taken here. Pp. 2–10.

(b) Before acting *sua sponte*, a court must accord the parties fair notice and an opportunity to present their positions. It must also assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and "determine whether the interests of justice would be better served" by addressing the merits or by dismissing the petition as time barred. See *Granberry*, 481 U. S., at 136. Here, the Magistrate Judge gave Day due notice and a fair opportunity to show why the limitation period should not yield dismissal. The notice issued some nine months after the State's answer. No court proceedings or action occurred in the interim, and nothing suggests that the State "strategically" withheld the defense or chose to relinquish it. From all that appears in the record, there was merely an inadvertent error, a miscalculation that was plain under Circuit precedent, and no abuse of discretion in following *Granberry* and *Caspari*. P. 11.

391 F. 3d 1192, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, SOUTER, and ALITO, JJ., joined. STEVENS, J., filed an opinion dissenting from the judgment, in which BREYER, J., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS and BREYER, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1324

PATRICK DAY, PETITIONER *v.* JAMES R. McDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 25, 2006]

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the authority of a U. S. District Court, on its own initiative, to dismiss as untimely a state prisoner's petition for a writ of habeas corpus. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, sets a one-year limitation period for filing such petitions, running from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U. S. C. §2244(d)(1)(A). The one-year clock is stopped, however, during the time the petitioner's "properly filed" application for state postconviction relief "is pending." §2244(d)(2). Under Eleventh Circuit precedent, that tolling period does not include the 90 days in which a petitioner might have sought certiorari review in this Court challenging state-court denial of postconviction relief. *Coates* v. *Byrd*, 211 F. 3d 1225, 1227 (2000).

In the case before us, the State's answer to the federal habeas petition "agree[d] the petition [was] timely" be-

cause it was "filed after 352 days of untolled time." App. 24. Inspecting the pleadings and attachments, a Federal Magistrate Judge determined that the State had miscalculated the tolling time. Under Circuit precedent, the untolled time was 388 days, rendering the petition untimely by some three weeks. After affording the petitioner an opportunity to show cause why the petition should not be dismissed for failure to meet the statutory deadline, and finding petitioner's responses inadequate, the Magistrate Judge recommended dismissal of the petition. The District Court adopted the Magistrate Judge's recommendation, and the Court of Appeals affirmed, concluding that "[a] concession of timeliness by the state that is patently erroneous does not compromise the authority of a district court *sua sponte* to dismiss a habeas petition as untimely, under AEDPA." *Day* v. *Crosby*, 391 F. 3d 1192, 1195 (CA11 2004).

The question presented is whether a federal court lacks authority, on its own initiative, to dismiss a habeas petition as untimely, once the State has answered the petition without contesting its timeliness. Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto. Fed. Rules Civ. Proc. 8(c), 12(b), and 15(a). And we would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense. In this case, however, the federal court confronted no intelligent waiver on the State's part, only an evident miscalculation of the elapsed time under a statute designed to impose a tight time constraint on federal habeas petitioners.[1] In

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[1]Until AEDPA took effect in 1996, no statute of limitations applied to habeas petitions. See *Mayle* v. *Felix*, 545 U. S. ___, ___ (2005) (slip op., at 7). Courts invoked the doctrine of "prejudicial delay" to screen out unreasonably late filings. See generally 2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure §24 (4th ed. 2001). In AEDPA, Congress prescribed a uniform rule: "A 1-year period of limita-

the circumstances here presented, we hold, the federal court had discretion to correct the State's error and, accordingly, to dismiss the petition as untimely under AEDPA's one-year limitation.

I

Petitioner Patrick A. Day was convicted of second-degree murder and sentenced to 55 years in prison by a Florida trial court. Day unsuccessfully appealed the sentence, which was affirmed on December 21, 1999. Day did not seek this Court's review of the final state-court decision; his time to do so expired on March 20, 2000.

Three hundred and fifty-three (353) days later, Day unsuccessfully sought state postconviction relief. The Florida trial court's judgment denying relief was affirmed on appeal, and the appellate court issued its mandate on December 3, 2002. See *Nyland* v. *Moore*, 216 F. 3d 1264, 1267 (CA11 2000) (under Florida law, appellate order "is pending" until the mandate issues). Thirty-six (36) days thereafter, on January 8, 2003, Day petitioned for federal habeas relief asserting several claims of ineffective assistance of trial counsel. A Magistrate Judge, finding the petition "in proper form," App. 21, ordered the State to file an answer, *id.*, at 21–22. In its responsive pleading, the State failed to raise AEDPA's one-year limitation as a defense. See *supra*, at 2. Overlooking controlling Eleventh Circuit precedent, see *Coates*, 211 F. 3d, at 1227, the State calculated that the petition had been "filed after 352 days of untolled time," and was therefore "timely." App. 24. The State's answer and attachments, however, revealed that, had the State followed the Eleventh Circuit's instruction on computation of elapsed time, the timeliness concession would not have been made: Under the Circuit's

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tion shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U. S. C. §2244(d)(1).

precedent, more than one year, specifically, 388 days of untolled time, had passed between the finality of Day's state-court conviction and the filing of his federal habeas petition.[2]

A newly assigned Magistrate Judge noticed the State's computation error and ordered Day to show cause why his federal habeas petition should not be dismissed as untimely. *Id.*, at 26–30. Determining that Day's responses did not overcome the time bar, the Magistrate Judge recommended dismissal of the petition, App. to Pet. for Cert. 8a–15a, and the District Court adopted that recommendation, *id.*, at 7a.

The Eleventh Circuit granted Day a certificate of appealability on the question "[w]hether the district court erred in addressing the timeliness of [Day's] habeas corpus petition . . . after the [State] had conceded that [the] petition was timely." App. 37. In a decision rendered two years earlier, *Jackson* v. *Secretary for Dept. of Corrections*, 292 F. 3d 1347 (2002), the Eleventh Circuit had ruled that, "even though the statute of limitations is an affirmative defense, the district court may review *sua sponte* the timeliness of [a federal habeas] petition." *Id.*, at 1349. Adhering to *Jackson*, and satisfied that the State's conces-

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[2]Day urges this Court to find his petition timely. He asserts that the Eleventh Circuit misinterpreted §2244(d)(2) in holding that AEDPA's time limitation was not tolled during the 90-day period he could have petitioned this Court to review the denial of his motion for state postconviction relief. See Brief for Petitioner 45–50. This question was not "set out in the petition [for certiorari], or fairly included therein," and we therefore do not consider it here. This Court's Rule 14.1(a). We note, however, that the Court recently granted certiorari in *Lawrence* v. *Florida*, No. 05–8820 (cert. granted, Mar. 27, 2006), which presents the question whether AEDPA's time limitation is tolled during the pendency of a petition for certiorari from a judgment denying state postconviction relief. The instant opinion, we emphasize, addresses only the authority of the District Court to raise AEDPA's time bar, not the correctness of its decision that the limitation period had run.

sion of timeliness "was patently erroneous," the Eleventh Circuit affirmed the dismissal of Day's petition. 391 F. 3d, at 1192–1195.[3]

We granted certiorari *sub nom. Day* v. *Crosby*, 545 U. S. ___ (2005), in view of the division among the Circuits on the question whether a district court may dismiss a federal habeas petition as untimely under AEDPA, despite the State's failure to raise the one-year limitation in its answer to the petition or its erroneous concession of the timeliness issue. Compare, *e.g.*, *Long* v. *Wilson*, 393 F. 3d 390, 401–404 (CA3 2004), and 391 F. 3d, at 1194–1195 (case below), with *Scott* v. *Collins*, 286 F. 3d 923, 930–931 (CA6 2002), and *Nardi* v. *Stewart*, 354 F. 3d 1134, 1141–1142 (CA9 2004).

II

A statute of limitations defense, the State acknowledges, is not "jurisdictional," hence courts are under no *obligation* to raise the time bar *sua sponte*. See, *e.g.*, *Acosta* v. *Artuz*, 221 F. 3d 117, 122 (CA2 2000); *Hill* v. *Braxton*, 277 F. 3d 701, 705 (CA4 2002); *Davis* v. *Johnson*, 158 F. 3d 806, 810

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[3]Day reads the Eleventh Circuit's opinion in this case as rendering mandatory a district court's *sua sponte* application of AEDPA's one-year limitation, even when the respondent elects to waive the limitation and oppose the petition solely on the merits. See Tr. of Oral Arg. 6–8. He points to a sentence in the Eleventh Circuit's brief *per curiam* opinion stating: "A federal court that sits in collateral review of a criminal judgment of a state court has an obligation to enforce the federal statute of limitations." 391 F. 3d, at 1194. We read the Eleventh Circuit's summary disposition in line with that court's description of its controlling precedent: "We . . . ruled that, 'even though the statute of limitations is an affirmative defense, the district court *may* review *sua sponte* the timeliness of [a federal habeas] petition.'" *Ibid.* (referring to *Jackson* v. *Secretary for Dept. of Corrections*, 292 F. 3d, at 1349 (emphasis added)); see also 391 F. 3d, at 1195 (State's "patently erroneous" concession of timeliness "does not compromise *the authority* of a district court *sua sponte* to dismiss a habeas petition as untimely" under AEDPA's one-year limitation (emphasis added)).

(CA5 1998); cf. *Kontrick* v. *Ryan*, 540 U. S. 443, 458 (2004) (defendant forfeited untimeliness argument "by failing to raise the issue until after [the] complaint was adjudicated on the merits"). In this respect, the limitations defense resembles other threshold barriers—exhaustion of state remedies, procedural default, nonretroactivity—courts have typed "nonjurisdictional," although recognizing that those defenses "implicat[e] values beyond the concerns of the parties." *Acosta*, 221 F. 3d, at 123 ("The AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time.").

On the exhaustion of state remedies doctrine, requiring state prisoners, before invoking federal habeas jurisdiction, to pursue remedies available in state court, *Granberry* v. *Greer*, 481 U. S. 129 (1987), is the pathmarking case. We held in *Granberry* that federal appellate courts have discretion to consider the issue of exhaustion despite the State's failure to interpose the defense at the district-court level. *Id.*, at 133.[4] Later, in *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994), we similarly held that "a federal court may, but need not, decline to apply [the nonretroactivity rule announced in *Teague* v. *Lane*, 489 U. S. 288, 310 (1989),] if the State does not argue it." See also *Schiro* v. *Farley*, 510 U. S. 222, 229 (1994) (declining to address nonretroactivity defense that State raised only in Supreme Court merits brief, "[a]lthough we undoubtedly have the discretion to reach" the argument).

While the issue remains open in this Court, see *Trest* v.

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[4]In AEDPA, enacted nearly a decade after *Granberry*, Congress expressly provided that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U. S. C. §2254(b)(3).

Cain, 522 U. S. 87, 90 (1997),[5] the Courts of Appeals have unanimously held that, in appropriate circumstances, courts, on their own initiative, may raise a petitioner's procedural default, *i.e.*, a petitioner's failure properly to present an alleged constitutional error in state court, and the consequent adequacy and independence of state-law grounds for the state-court judgment. See *Brewer* v. *Marshall*, 119 F. 3d 993, 999 (CA1 1997); *Rosario* v. *United States*, 164 F. 3d 729, 732 (CA2 1998); *Sweger* v. *Chesney*, 294 F. 3d 506, 520 (CA3 2002); *Yeatts* v. *Angelone*, 166 F. 3d 255, 261 (CA4 1999); *Magouirk* v. *Phillips*, 144 F. 3d 348, 358 (CA5 1998); *Sowell* v. *Bradshaw*, 372 F. 3d 821, 830 (CA6 2004); *Kurzawa* v. *Jordan*, 146 F. 3d 435, 440 (CA7 1998); *King* v. *Kemna*, 266 F. 3d 816, 822 (CA8 2001) (en banc); *Vang* v. *Nevada*, 329 F. 3d 1069, 1073 (CA9 2003); *United States* v. *Wiseman*, 297 F. 3d 975, 979 (CA10 2002); *Moon* v. *Head*, 285 F. 3d 1301, 1315, n. 17 (CA11 2002).

Petitioner Day relies heavily on Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules), *i.e.*, the procedural Rules governing federal habeas petitions from state prisoners, in urging that AEDPA's limitation may be raised by a federal court *sua sponte* only at the preanswer, initial screening stage. Habeas Rule 4 provides that district courts "must promptly examine" state prisoner habeas petitions and must dismiss the petition "[i]f it plainly appears . . . that the petitioner is not entitled to relief." Once an answer has been ordered and filed, Day maintains, the court loses authority to rule the petition untimely *sua sponte*.[6] At

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[5] *Trest* held that a Court of Appeals was not obliged to raise procedural default on its own initiative, but declined to decide whether courts have discretion to do so. 522 U. S., at 89.

[6] Were we to accept Day's position, courts would never (or, at least, hardly ever) be positioned to raise AEDPA's time bar *sua sponte*. As this Court recognized in *Pliler* v. *Ford*, 542 U. S. 225, 232 (2004), infor-

that point, according to Day, the Federal Rules of Civil Procedure hold sway. See Habeas Rule 11 ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.").[7] Under the Civil Procedure Rules, a defendant forfeits a statute of limitations defense, see Fed. Rule Civ. Proc. 8(c), not asserted in its answer, see Rule 12(b), or an amendment thereto, see Rule 15(a).

The State, on the other hand, points out that the statute of limitations is akin to other affirmative defenses to habeas petitions, notably exhaustion of state remedies, procedural default, and nonretroactivity. Indeed, the statute of limitations is explicitly aligned with those other defenses under the current version of Habeas Rule 5(b), which provides that the State's answer to a habeas petition "must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations." The considerations of comity, finality, and the expeditious handling of habeas proceedings that motivated AEDPA,[8] the State maintains, counsel against an excessively rigid or formal approach to the affirmative defenses now listed in Habeas Rule 5. Citing *Granberry*, 481 U. S., at 131–134, as the instructive case, the State urges express recognition of an "intermediate approach." Brief for Respon-

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mation essential to the time calculation is often absent—as it was in this case—until the State has filed, along with its answer, copies of documents from the state-court proceedings.

[7]The Habeas Rules were amended after the proceedings below. We cite the current version because both parties agree that the amendments to Rules 4 and 11, effective December 1, 2004, wrought no relevant substantive change.

[8]See *Rhines* v. *Weber*, 544 U. S. 269, 276 (2005) (AEDPA's time bar "quite plainly serves the well-recognized interest in the finality of state court judgments"; it "reduces the potential for delay on the road to finality[.]" (quoting *Duncan* v. *Walker*, 533 U. S. 167, 179 (2001))).

dent 14 (internal quotation marks omitted); see also *id.*, at 25. In lieu of an inflexible rule requiring dismissal whenever AEDPA's one-year clock has run, or, at the opposite extreme, a rule treating the State's failure initially to plead the one-year bar as an absolute waiver, the State reads the statutes, Rules, and decisions in point to permit the "exercise [of] discretion in each case to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition." *Id.*, at 14. Employing that "intermediate approach" in this particular case, the State argues, the petition should not be deemed timely simply because a government attorney calculated the days in between petitions incorrectly.

We agree, noting particularly that the Magistrate Judge, instead of acting *sua sponte*, might have informed the State of its obvious computation error and entertained an amendment to the State's answer. See Fed. Rule Civ. Proc. 15(a) (leave to amend "shall be freely given when justice so requires"); see also 28 U. S. C. §2243 (State's response to habeas petition may be amended by leave of court); cf. *Long*, 393 F. 3d, at 402–404 (District Court raised the statute of limitations *sua sponte*, the State agreed with that disposition, and the Court of Appeals treated that agreement as a constructive amendment to the State's answer). Recognizing that an amendment to the State's answer might have obviated this controversy,[9] we see no dispositive difference between that route, and the one taken here. See Brief for Respondent 24 ("Here, the State did not respond to the show cause order because its concession of timeliness was based on an erroneous calculation and it agreed the petition should be dismissed as untimely."); cf. *Slack* v. *McDaniel*, 529 U. S. 473, 487

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[9] The Court is unanimous on this point. See *post*, at 5, n. 2 (SCALIA, J., dissenting).

(2000) (admonishing against interpretation of procedural prescriptions in federal habeas cases to "trap the unwary *pro se* prisoner" (quoting *Rose* v. *Lundy*, 455 U. S. 509, 520 (1982))).

In sum, we hold that district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition. We so hold, noting that it would make scant sense to distinguish in this regard AEDPA's time bar from other threshold constraints on federal habeas petitioners. See *supra*, at 6–7; Habeas Rule 5(b) (placing "a statute of limitations" defense on a par with "failure to exhaust state remedies, a procedural bar, [and] non-retroactivity"); *Long*, 393 F. 3d, at 404 ("AEDPA's statute of limitations advances the same concerns as those advanced by the doctrines of exhaustion and procedural default, and must be treated the same."). We stress that a district court is not required to double-check the State's math. If, as this Court has held, "[d]istrict judges have no obligation to act as counsel or paralegal to *pro se* litigants," *Pliler* v. *Ford*, 542 U. S. 225, 231 (2004),[10] then, by the same token, they surely have no obligation to assist attorneys representing the State. Nevertheless, if a judge does detect a clear computation error, no Rule, statute, or constitutional provision commands the judge to suppress that knowledge. Cf. Fed. Rule Civ. Proc. 60(a) (clerical errors in the record "arising from oversight or omission may be corrected by the court

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[10]The procedural hindrance in *Pliler* was the petitioner's failure to exhaust state remedies. The Court in that case declined to rule on the propriety of the stay-and-abeyance procedure that would enable a habeas petitioner to remain in federal court while exhausting unexhausted claims in state court. 542 U. S., at 231. In a later decision, *Rhines*, 544 U. S., at 278–279, this Court held that a district court has discretion to stay a "mixed petition (*i.e.*, one that includes both exhausted and unexhausted claims) to allow a habeas petitioner to present his unexhausted claims to the state court in the first instance, then return to federal court for review of his perfected petition.

at any time of its own initiative or on the motion of any party").

Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions. See, *e.g.*, *Acosta*, 221 F. 3d, at 124–125; *McMillan* v. *Jarvis*, 332 F. 3d 244, 250 (CA4 2003). Further, the court must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and "determine whether the interests of justice would be better served" by addressing the merits or by dismissing the petition as time barred. See *Granberry*, 481 U. S., at 136.[11] Here, the Magistrate Judge gave Day due notice and a fair opportunity to show why the limitation period should not yield dismissal of the petition. The notice issued some nine months after the State answered the petition. No court proceedings or action occurred in the interim, and nothing in the record suggests that the State "strategically" withheld the defense or chose to relinquish it. From all that appears in the record, there was merely an inadvertent error, a miscalculation that was plain under Circuit precedent, and no abuse of discretion in following this Court's lead in *Granberry* and *Caspari*, described *supra*, at 6–7.

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For the reasons stated, the judgment of the Court of Appeals is

Affirmed.

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[11] A district court's discretion is confined within these limits. As earlier noted, should a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice. See *supra*, at 2. But see *post*, at 7 (SCALIA, J., dissenting).

SUPREME COURT OF THE UNITED STATES

No. 04–1324

PATRICK DAY, PETITIONER *v.* JAMES R. McDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 25, 2006]

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting from the judgment.

Although JUSTICE BREYER and I disagree on the proper answer to the question on which we granted certiorari—in my view, JUSTICE GINSBURG's opinion for the Court correctly decides that question, while JUSTICE BREYER has joined JUSTICE SCALIA's dissenting opinion—we agree on the proper disposition of this case. In our view, the Court should announce its opinion now, but it should postpone the entry of judgment pending our decision in *Lawrence* v. *Florida*, No. 05–8820 (cert. granted, Mar. 27, 2006). As JUSTICE GINSBURG notes, the question whether the Court of Appeals correctly concluded that Day's habeas corpus petition was barred by the statute of limitations will be answered by our decision in *Lawrence*. See *ante*, at 4, n. 2. It seems improvident to affirm a possibly erroneous Court of Appeals judgment that dismissed Day's habeas petition without an evaluation of its merits when we have already granted certiorari to address the issue on which the Court of Appeals may have erred. Of course, the Court of Appeals may avoid a miscarriage of justice by keeping this case on its docket until after we decide *Lawrence*, but it would be better practice for us to do so ourselves. Accord-

ingly, we respectfully dissent from the entry of the Court's judgment at this time.

SUPREME COURT OF THE UNITED STATES

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PATRICK DAY, PETITIONER *v.* JAMES R. McDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 25, 2006]

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE BREYER join, dissenting.

The Court today disregards the Federal Rules of Civil Procedure (Civil Rules) in habeas corpus cases, chiefly because it believes that this departure will make no difference. See *ante*, at 9. Even if that were true, which it is not, I could not join this novel presumption *against* applying the Civil Rules.

The Civil Rules "govern the procedure in the United States district courts in all suits of a civil nature." Rule 1. This includes "proceedings for . . . habeas corpus," Rule 81(a)(2), but only "to the extent that the practice in such proceedings is not set forth in statutes of the United States [or] the Rules Governing Section 2254 Cases [Habeas Rules]," Civil Rule 81(a)(2); see also Habeas Rule 11. Thus, "[t]he Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules," *Woodford* v. *Garceau*, 538 U. S. 202, 208 (2003), and do not contradict or undermine the provisions of the habeas corpus statute, *Gonzalez* v. *Crosby*, 545 U. S. ___, ___ (2005) (slip op., at 4–5).

As the Court notes, the Civil Rules adopt the traditional

forfeiture rule for unpleaded limitations defenses. See *ante*, at 8 (citing Rules 8(c), 12(b), 15(a)). The Court does not identify any "inconsisten[cy]" between this forfeiture rule and the statute, Rules, or historical practice of habeas proceedings—because there is none. Forfeiture of the limitations defense is demonstrably not inconsistent with traditional habeas practice, because, as the Court acknowledges, habeas practice included no statute of limitations until 1996. *Ante*, at 2, n. 1; see also *infra*, at 3–5. Forfeiture is perfectly consistent with Habeas Rule 5(b), which now provides that the State's "answer . . . *must* state whether any claim in the petition is barred by . . . statute of limitations." (Emphasis added.) And forfeiture is also consistent with (and indeed, arguably suggested by) Habeas Rule 4, because Rule 4 provides for *sua sponte* screening and dismissal of habeas petitions only *prior* to the filing of the State's responsive pleading.[1]

Most importantly, applying the forfeiture rule to the limitations period of 28 U. S. C. §2244(d) does not contradict or undermine any provision of the habeas statute. Quite the contrary, on its most natural reading, the statute calls for the forfeiture rule. AEDPA expressly enacted, without further qualification, "[a] 1-year *period of limitation*" for habeas applications by persons in custody pursuant to the judgments of state courts. §2244(d)(1) (emphasis added). We have repeatedly stated that the enactment of time-limitation periods such as that in §2244(d), without further elaboration, produces defenses that are non-

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[1]The Court observes that "[w]ere we to accept Day's position, courts would never (or, at least, hardly ever) be positioned to raise AEDPA's [Antiterrorism and Effective Death Penalty Act of 1996] time bar *sua sponte*," because "information essential to the time calculation is often absent" at the Rule 4 prescreening stage. *Ante*, at 7–8, n. 6. But to be distressed at this phenomenon is to beg the question—that is, to assume that courts *ought* to "be positioned to raise AEDPA's time bar *sua sponte*." That is precisely the question before us.

jurisdictional and thus subject to waiver and forfeiture. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 393 (1982); see also *Eberhart* v. *United States*, 546 U. S. ___, ___ (2005) *(per curiam)* (slip op., at 3); *Kontrick* v. *Ryan*, 540 U. S. 443, 447 (2004). Absent some affirmative incompatibility with habeas practice, there is no reason why a habeas limitations period should be any different. By imposing an unqualified "period of limitation" against the background understanding that a defense of "limitations" must be raised in the answer, see Civil Rules 8(c), 12(b), the statute implies that the usual forfeiture rule is applicable.

Instead of identifying an inconsistency between habeas corpus practice and the usual civil forfeiture rule, the Court urges that "it would make scant sense to distinguish in this regard AEDPA's time bar from other threshold constraints on federal habeas petitioners" that may be raised *sua sponte*—*ante*, at 10—namely, exhaustion of state remedies, procedural default, nonretroactivity, and (prior to AEDPA) abuse of the writ. See *Granberry* v. *Greer*, 481 U. S. 129, 133 (1987) (exhaustion); *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994) (nonretroactivity). But unlike AEDPA's statute of limitations, these defenses were all created by the habeas courts themselves, in the exercise of their traditional equitable discretion, see *Withrow* v. *Williams*, 507 U. S. 680, 717–718 (1993) (SCALIA, J., concurring in part and dissenting in part), because they were seen as necessary to protect the interests of comity and finality that federal collateral review of state criminal proceedings necessarily implicates. See *McCleskey* v. *Zant*, 499 U. S. 467, 489–491 (1991) (abuse of the writ); *Wainwright* v. *Sykes*, 433 U. S. 72, 80–81 (1977) (procedural default); *Teague* v. *Lane*, 489 U. S. 288, 308 (1989) (nonretroactivity); *Rose* v. *Lundy*, 455 U. S. 509, 515 (1982) (exhaustion of state remedies). Unlike these other defenses, no time limitation—not even equitable

laches—was imposed to vindicate comity and finality. AEDPA's 1-year limitations period is entirely a recent creature of statute. See *ante*, at 2, n. 1. If comity and finality did not compel any time limitation at all, it follows *a fortiori* that they do not compel making a legislatively created, forfeitable time limitation *nonforfeitable*.

In fact, prior to the enactment of AEDPA, we affirmatively rejected the notion that habeas courts' traditionally broad discretionary powers would support their imposition of a time bar. Historically, "there [wa]s no statute of limitations governing federal habeas, and the only laches recognized [wa]s that which affects the State's ability to defend against the claims raised on habeas"—which was imposed by Rule, and not until 1977. *Brecht* v. *Abrahamson*, 507 U. S. 619, 637 (1993); see also *United States* v. *Smith*, 331 U. S. 469, 475 (1947); 17A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4268.2, p. 497–498 (2d ed. 1988) (hereinafter Wright & Miller). We repeatedly asserted that the passage of time alone could not extinguish the habeas corpus rights of a person subject to unconstitutional incarceration. See *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116, 123 (1956); *Chessman* v. *Teets*, 354 U. S. 156, 164–165 (1957). For better or for worse, this doctrine was so well entrenched that the lower courts regularly entertained petitions filed after even extraordinary delays. See, *e.g.*, *Hawkins* v. *Bennett*, 423 F. 2d 948, 949 (CA8 1970) (40 years); *Hamilton* v. *Watkins*, 436 F. 2d 1323, 1325 (CA5 1970) (at least 36 years); *Hannon* v. *Maschner*, 845 F. 2d 1553, 1553–1555 (CA10 1988) (at least 24 years). And in 1977, when enactment of the former Habeas Rule 9(a) "introduce[d] for the first time an element of laches into habeas corpus," 17A Wright & Miller §4268.2, at 498—by adopting the rule against "'prejudicial delay'" to which the Court refers, *ante*, at 2, n. 1—even that limited doctrine was treated as subject to the very same pleading requirements and forfei-

ture rule that the Court rejects today for the stricter limitations period of §2244(d). See *Smith* v. *Secretary of New Mexico Dept. of Corrections*, 50 F. 3d 801, 821–822, n. 30 (CA10 1995); see also *McDonnell* v. *Estelle*, 666 F. 2d 246, 249 (CA5 1982).

There is, therefore, no support for the notion that the traditional equitable discretion that governed habeas proceedings permitted the dismissal of habeas petitions on the sole ground of untimeliness. Whether or not it should have, see *Collins* v. *Byrd*, 510 U. S. 1185, 1186–1187 (1994) (SCALIA, J., dissenting), it did not. The Court's reliance on pre-existing equitable doctrines like procedural default and nonretroactivity is, therefore, utterly misplaced. Nothing in our tradition of *refusing* to dismiss habeas petitions as untimely justifies the Court's decision to beef up the presumptively forfeitable "limitations period" of §2244(d) by making it the subject of *sua sponte* dismissal.

In what appears to be the chief ground of its decision, the Court also observes that "the Magistrate Judge, instead of acting *sua sponte*, might have informed the State of its obvious computation error and entertained an amendment to the State's answer" under Civil Rule 15(a). *Ante*, at 9. "Although an amendment to the State's answer might have obviated this controversy," the Court concedes, "we see no dispositive difference between that route, and the one taken here." *Ibid.* But this consideration cuts in the opposite direction. If there truly were no "dispositive difference" between following and disregarding the rules that Congress has enacted, the natural conclusion would be that there is no compelling reason to *disregard* the Civil Rules.[2] Legislatively enacted rules are surely entitled to

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[2] I agree with the Court that today's decision will have little impact on the outcome of district court proceedings. In particular, I agree that "if a [district] judge does detect a clear computation error, no Rule,

more respect than this apparent presumption that, when nothing substantial hangs on the point, they do *not* apply as written. And, unlike the novel regime that the Court adopts today, which will apparently require the development of new rules from scratch, there already exists a well-developed body of law to govern the district courts' exercise of discretion under Rule 15(a). See 6 Wright & Miller §§1484–1488 (2d ed. 1990 and Supp. 2005). Ockham is offended by today's decision, even if no one else is.

But, in fact, there are at least two notable differences between the Civil Rules and the *sua sponte* regime of such cases as *Granberry* and *Caspari*—both of which involve sufficiently significant departures from ordinary civil practice as to require clear authorization from the statute, the Rules, or historical habeas practice. First, the *Granberry* regime allows the forfeited procedural defense to be raised for the first time on appeal, either by the State or by the appellate court *sua sponte*. See 481 U. S., at 130, 133; *Schiro* v. *Farley*, 510 U. S. 222, 228–229 (1994). Ordinary civil practice does not allow a forfeited affirmative defense whose underlying facts were not developed below to be raised for the first time on appeal. See *Weinberger* v. *Salfi*, 422 U. S. 749, 764 (1975); *Metropolitan Housing Development Corp.* v. *Arlington Heights*, 558 F. 2d 1283, 1287 (CA7 1977). The ability to raise even

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statute, or constitutional provision commands the judge to suppress that knowledge," *ante*, at 10. Rather, a judge may call the timeliness issue to the State's attention and invite a motion to amend the pleadings under Civil Rule 15(a), under which "leave shall be freely given when justice so requires." In fact, in providing for leave whenever "justice so requires," Rule 15(a), the Civil Rules fully accommodate the comity and finality interests that the Court thinks require a departure from the Civil Rules, see *ante*, at 6–7, 10. Requiring the State to take the affirmative step of amending its own pleading at least observes the formalities of our adversary system, which is a nontrivial value in itself. See *United States* v. *Burke*, 504 U. S. 229, 246 (1992) (SCALIA, J., concurring in judgment).

constitutional errors in criminal trials for the first time on appeal is narrowly circumscribed. See Fed. Rule Crim. Proc. 52(b); *United States* v. *Olano*, 507 U. S. 725, 732 (1993). Comity and finality justified this departure from ordinary practice for historically rooted equitable defenses such as exhaustion. See *Granberry*, *supra*, at 134. But limitations was not such a defense.

Also, *Granberry* and the like raise the possibility that the courts can impose a procedural defense over the State's affirmative decision to waive that defense. The Court takes care to point out that this is not such a case, *ante*, at 11, but it invites such cases in the future. After all, the principal justification for allowing such defenses to be raised *sua sponte* is that they "'implicat[e] values beyond the concerns of the parties,'" including "'judicial efficiency and conservation of judicial resources'" and "the expeditious handling of habeas proceedings." *Ante*, at 6, 8 (quoting *Acosta* v. *Artuz*, 221 F. 3d 117, 123 (CA2 2000)). There are many reasons why the State may wish to disregard the statute of limitations, including the simple belief that it would be unfair to impose the limitations defense on a particular defendant.[3] On the Court's reasoning, a district court would not abuse its discretion in overriding the State's conscious waiver of the defense in order to protect such "'values beyond the concerns of the parties,'" *ante*, at 6.[3] Under the Civil Rules, by contrast, amending a party's

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[3] In order to avoid this seemingly unavoidable conclusion, the Court asserts, without relevant citation or reasoning, that "should a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice." *Ante*, at 11, n. 11. This assertion is contrary to our statement in *Granberry* v. *Greer*, 481 U. S. 129, 134 (1987)—a case which, on the Court's view, it makes "scant sense to distinguish," *ante*, at 10—that an appellate court may dismiss an unexhausted petition *sua sponte* in "cases in which the State fails, *whether inadvertently or otherwise*, to raise an arguably meritorious nonexhaustion defense." (Emphasis added.) To support its assertion, the Court cites nothing but its own earlier statement: "Ordi-

pleading over his objection would constitute a clear abuse of the trial court's discretion.

In sum, applying the ordinary rule of forfeiture to the AEDPA statute of limitations creates no inconsistency with the Habeas Rules. On the contrary, it is the Court's unwarranted expansion of the timeliness rule enacted by Congress that is inconsistent with the statute, the Habeas Rules, the Civil Rules, and traditional practice. I would hold that the ordinary forfeiture rule, as codified in the Civil Rules, applies to the limitations period of §2244(d). I respectfully dissent.

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narily in civil litigation, a statutory time limit is forfeited if not raised in a defendant's answer or in an amendment thereto. Fed. Rules Civ. Proc. 8(c), 12(b), and 15(a). And we would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense." *Ante*, at 2. But as the statement itself shows, the "ordinary" inability to override the State's "intelligent" waiver is coupled with an "ordinary" automatic forfeit of the defense if it is not timely raised. The Court does not say why it makes sense, for the statute of limitation of §2244(d)(1)(A), to reject (as it does) the first part of the ordinary practice (automatic forfeiture), while embracing the second (inability to override intelligent waiver). The *reason* for rejecting the first part surely applies just as well to the second: Section 2244(d)(1)(A) supposedly "'implicate[s] values beyond the concerns of the parties,'" including "'judicial efficiency,'" "'conservation of judicial resources'" and "expeditious handling of habeas proceedings." *Ante*, at 6, 8.